No. 84-267

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM P. CLARK, ET AL., PETITIONERS

v.

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Bureau of Land Management's environmental assessment of the human health risks of using certain herbicides on specific federal lands, which relied, in part, upon a scientific evaluation of the health effects of the herbicide conducted by the Environmental Protection Agency (EPA) in registering the herbicides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), satisfied the requirements of the National Environmental Policy Act of 1969 (NEPA) and its implementing regulations.

PARTIES TO THE PROCEEDING

The parties to this proceeding in addition to those listed in the caption are Robert Burford, William Leavell and Hugh Shera.

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The Solicitor General, on behalf of the Secretary of the Interior, the Director of the Bureau of Land Management (BLM) and other BLM officials, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 720 F.2d 1475. The opinion of the district court is unreported (App., *infra*, 13a-24a).

JURISDICTION

The judgment of the court of appeals (App., *infra*, 25a) was entered on December 2, 1983. A petition for rehearing was denied on March 21, 1984 (App., *infra*, 26a). On June 8, 1984, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and

including August 1, 1984. On July 24, 1984, Justice Rehnquist further extended the time for filing a petition for a writ of certiorari to and including August 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. V) 4332, and relevant provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, are reprinted at App., *infra*, 27a-33a.

STATEMENT

1. The Bureau of Land Management (BLM) is required by the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act), 43 U.S.C. 1181a *et seq.*, to manage public timber lands in western Oregon for the purpose of providing a "permanent source of timber supply * * * and contributing to the economic stability of local communities and industries * * *." 43 U.S.C. 1181a. Under the O&C Act, BLM may allow the timber to be harvested only according to the principle of sustained yield. 43 U.S.C. 1181a. Fifty percent of BLM's receipts from timber sold on O&C Act lands are distributed to eighteen designated county governments in Western Oregon. 43 U.S.C. 1181f.

In order to satisfy the mandate of the O&C Act, BLM in 1978 proposed to conduct an herbicide spraying program for a 10-year period on the federal lands subject to the Act. 1 Bureau of Land Management, U.S. Dep't of the Interior, *Vegetation Management With Herbicides: Western Oregon—Final Environmental Statement 1978*, at 1-24 [hereinafter cited as *Final Environmental Statement*].[1] The purpose of the spraying

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[1] BLM has for many years employed herbicides in connection with the management of the O&C Act lands within its control. Prior to 1977, BLM had conducted environmental assessments

was to prepare new sites for reforestation, to protect young conifers from surrounding vegetation, and to control noxious weeds and roadside vegetation (*id.* at 1-30 to 1-31). The agency proposed to use several methods to spray the herbicides; the most widely used method would involve aerial spraying from helicopters, made necessary by the difficult terrain and the remoteness of most sites. The agency also proposed to conduct ground spraying from either tanker trucks or backpacks. *Id.* at 1-32 to 1-33.[2]

As part of its proposal to use herbicides on O&C Act lands, the BLM prepared a programmatic environmental impact statement examining its proposed use of herbicides, all of which had been registered by the EPA pursuant to FIFRA and all of which are "in widespread and common use" (*Final Environmental Statement*

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of its herbicide proposals and found that they created no significant environmental impact requiring an environmental impact statement. Because in 1978 BLM proposed to use the herbicides Silvex and 2,4,5-T, which had come under the scrutiny of the EPA because of dioxin contaminants associated with those herbicides, BLM concluded that an impact statement should be prepared. BLM discontinued use of all herbicides during the 12-18 months during which the environmental impact statement was being prepared. *Final Environmental Statement* 1-23 to 1-24. A copy of the *Final Environmental Statement* has been lodged with the Clerk of the Court.

[2] Typically, the spraying program is conducted in discrete geographic districts. There are, for example, five local districts in western Oregon, each of which conducts its own spraying program. The spraying requirements vary from district to district and within the districts from year to year. Thus, one BLM district may spray 1,000 acres for site preparation and 1,000 acres for "release" of young conifers from competing brush in one year and 10 acres for each purpose the next. Ordinarily, a site sprayed for reforestation will not be sprayed again for several years, when it is necessary to release the conifer seedlings. After the release spraying, that site generally will not be sprayed again until after the trees are harvested, and the site is again prepared for reforestation. Spraying programs conducted in national forests by the Forest Service follow a similar pattern.

3-2). See pages 12-14, *infra*.[3] The programmatic EIS contained a thorough discussion of the known human health and other environmental consequences of the use of these herbicides (*id.* at 3-1 to 3-94). The EIS also emphasized that, although analysis of environmental impacts of herbicide use is within the primary jurisdiction of the EPA, the BLM would "keep abreast of * * * research findings and, where indicated by research results and EPA recommendations, adjust its proposed herbicide applications to minimize adverse environmental impacts" (*id.* at 1-48).[4]

In order to keep abreast of research developments and to maintain on a current basis its examination of potential site-specific environmental effects of the proposed vegetation management program, BLM prepared yearly environmental assessments. The site-specific impacts considered in the assessments included weather conditions, terrain, wildlife and the existence of residential areas with respect to proposed spraying during the forthcoming year. The assessments also considered the particular spraying techniques that might be used, how much spraying was required, what herbicides to use and how best to mitigate any adverse effects likely to be caused by the spraying. See, *e.g.*, Bureau of Land

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[3] The only proposed herbicide that received individualized analysis by the courts below was 2,4-D. To give some idea how commonly used 2,4-D is, there are approximately *1500* products containing 2,4-D registered with EPA. Over 60 million pounds of 2,4-D active ingredient were applied domestically in 1979, with most of that being used to control broadleaf weeds in small grains, field corn and on range and pastureland. N.Y. Times, Apr. 30, 1980, at A20, col. 6.

[4] The herbicides proposed for use by the BLM were 2,4-D, Silvex, Sinazine, Atrazine, Diuron, Picloram, Dalapon, Dicamba, Krenite and Glyphosate. *Final Environmental Statement* 1-38 to 1-41. Use of Silvex was discontinued when EPA suspended its registration because of a particular dioxin contaminant found in 2,4,5-T and Silvex.

Management, U.S. Dep't of the Interior, *1982 Final Vegetative Management Program: Supplemental Environmental Assessment* [hereinafter cited as *1982 Environmental Assessment*].[5]

2. In 1979, approximately one year after the publication of BLM's programmatic EIS, respondent, an environmental group, filed this action in the United States District Court for the District of Oregon. Respondent sought, under NEPA, to enjoin the BLM from spraying the proposed herbicides as part of the forest management program.[6] The complaint alleged that BLM violated NEPA by failing to prepare a new EIS for the

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[5] A copy of the *1982 Environmental Assessment* has been lodged with the Clerk of this Court.

[6] This was not the first challenge under NEPA to the federal government's use of herbicide spraying in Oregon. In *Citizens Against Toxic Sprays, Inc.* v. *Bergland (CATS I)*, 428 F. Supp. 908 (D. Or. 1977), an environmental group challenged the sufficiency of the Forest Service's EIS for herbicide spraying in the Siuslaw National Forest. The district court found that the EIS contained an inadequate discussion of the human health effects of spraying 2,4,5-T, a herbicide known to contain the highly toxic dioxin TCDD. 428 F. Supp. at 927. Of particular concern to the court was the failure of the EIS to disclose the fact that the EPA was conducting administrative hearings on the FIFRA registration status of 2,4,5-T. Because of the Forest Service's failure to disclose this information, as well as other information on the scientific controversy surrounding TCDD, the court enjoined the use of 2,4,5-T pending the preparation of an adequate EIS. The court, however, expressly declined to enjoin the use of 2,4-D, because it does not contain TCDD. 428 F. Supp. at 933.

While the government considered whether to appeal the injunction, the Forest Service proceeded to prepare a new EIS, which contained an extensive discussion of the human health effects of 2,4,5-T, as well as other herbicides. The discussion was based on a thorough review of published scientific studies and reports about likely health effects. In reviewing this new EIS, the district court, although not agreeing with the Forest Service's decision to use herbicides, lifted the injunction and found the EIS adequate. *Citizens Against Toxic, Sprays, Inc.* v. *Bergland (CATS II)*, 11 E.R.C. 1557 (1978).

spraying proposal for that year; that the programmatic EIS failed to discuss adequately the health impacts caused by herbicides; and that neither the programmatic EIS nor the yearly environmental assessments contained a "worst case" analysis within the meaning of 40 C.F.R. 1502.22.[7] After the district court denied respondent's motion for a preliminary injunction in 1979, the case lay dormant until 1982. In the interim BLM conducted its annual spraying program.

In 1982, the district court ruled on the parties' cross-motions for summary judgment (App., *infra*, 13a-24a). The district court found that the 1978 programmatic EIS contained an adequate discussion of the health effects of 2,4-D, because the agency had a duty only "to discuss *probable* effects known at the time" (*id.* at 18a (emphasis in original)).

The court, however, enjoined the spraying of herbicides pending completion of a worst case analysis pur-

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[7] 40 C.F.R. 1502.22 provides:

> When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.
>
> (a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> (b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (*e.g.*, the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

suant to 40 C.F.R. 1502.22(b) and its inclusion in an environmental assessment. The court held that the existence of scientific uncertainty or of any gaps in relevant information concerning the possible human health effects of a proposed action was enough to trigger the regulation's requirement that an agency include a worst case analysis in its impact statement (App., *infra*, 20a). The court then found there was some scientific uncertainty with respect to the health effects on humans of even small dosages of 2,4-D; this was based largely on the inability of any expert to reject catagorically the possibility that any herbicide might cause cancer (*id.* at 21a-24a). Finally, the court held that the BLM could not rely upon the EPA's determination to register the herbicides pursuant to FIFRA as a justification for concluding that the uncertainty was too insubstantial to warrant a fuller inquiry into the problem. Instead, the court held that the BLM must prepare its own analysis of the environmental safety of the herbicides (App., *infra*, 23a n.3).[8]

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[8] The district court also ruled that the worst case analysis regulation applies to environmental assessments as well as to situations where an EIS is prepared (App., *infra*, 19a); the court of appeals affirmed as to this point (*id.* at 8a-10a).

The district court in a later opinion also denied respondent's request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d), on the ground that the government's position was "substantially justified." *Southern Oregon Citizens Against Toxic Sprays* v. *Watt*, 556 F. Supp. 155 (D. Or. 1983). Respondent's cross-appealed the denial of the attorney's fees, and the court of appeals affirmed (App., *infra*, 11a). The court of appeals, however, held that fees were available for services rendered in connection with the appeal, because the government's position had become less justifiable in light of decisions of other courts interpreting 40 C.F.R. 1502.22 (App., *infra*, 11a-12a). Although we obviously maintain the view that BLM's position on appeal was not only substantially justified, but also absolutely correct, we are not seeking review by this Court of the separate, case-specific issue concerning the reasonableness of the government's position for purposes of the attorney's fees award.

The court of appeals affirmed (App., *infra*, 1a-12a). The court held that BLM was required to include a worst case analysis in its Environmental Assessment. It agreed with the district court that the "possibility that the safe level of dosage for herbicides is low or nonexistent creates a possibility of 'significant adverse effects on the human environment.' 40 C.F.R. § 1502.22" (App. *infra*, 6a). The court rejected the contention that BLM need not conduct a worst case analysis because the safety of these herbicides had been evaluated by the EPA when it registered them under FIFRA. Instead, the court held that the BLM "must assess independently the safety of the herbicides that it uses" and cannot rely upon another agency's analysis (App. *infra*, 8a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals, requiring BLM independently to assess the safety of the herbicides it uses as part of its statutorily-mandated vegetation management program, is an unprecedented expansion of the obligations of federal agencies under NEPA to gather and consider information about environmental impacts that might result from their proposed actions. By requiring federal agencies either to acquire perfect knowledge in fields that are by their nature uncertain, or to analyze totally hypothetical worst case scenarios, the court of appeals has distorted the essential purpose of NEPA, which is to assure that decision makers take reasonable steps to make themselves aware of environmental consequences that their actions may cause. Moreover, the court of appeals, by requiring each agency proposing to use registered herbicides to duplicate EPA's efforts and duties in registering the herbicides for a specific use pursuant to FIFRA, has rendered FIFRA irrelevant to federal agencies in a way that Congress could not have intended. Finally, the court's misapplication of NEPA will result immediately

in a tremendous waste of resources by BLM and threatens to cause lengthy and expensive delays in important land management and other programs that rely upon pesticides already registered by EPA under FIFRA.

1. a. Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), directs federal agencies when proposing actions that significantly affect "the quality of the human environment" to include a detailed statement "on the environmental impact of the proposed action * * *." This Court has held that this is a procedural requirement that obligates agencies simply to take a "hard look" at environmental consequences. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (quoting *NRDC* v. *Morton*, 458 F.2d 827,838 (D.C. Cir. 1972)). See *Baltimore Gas & Electric Co.* v. *NRDC*, No. 82-524 (June 6, 1983), slip op. 12. Moreover, this responsibility is limited by a rule of reason; this Court has never held that an agency must evaluate all possible environmental effects no matter how remote they may be. See *Metropolitan Edison Co.* v. *People Against Nuclear Energy (PANE)*, No. 81-2399 (Apr. 19, 1983), slip op. 7; cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978) ("[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved"). Instead, this Court has held that an impact statement's purpose is to provide information that would be useful to the decision maker in deciding whether to approve the proposed action. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. at 551; *Metropolitan Edison Co.* v. *PANE*, slip op. 9. Courts of appeals in applying NEPA's rule of reason test have routinely held that agencies "need not discuss remote and highly speculative consequences." *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). See, *e.g.*, *Warm Springs Dam Task Force* v.

Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980); *Environmental Defense Fund, Inc.* v. *Andrus*, 619 F.2d 1364, 1375 (10th Cir. 1980); *Environmental Defense Fund, Inc.* v. *Hoffman*, 566 F.2d 1060, 1067 (8th Cir. 1977); *NRDC* v. *Morton*, 458 F.2d 827, 836-837 (D.C. Cir. 1972).

The decision of the court of appeals is unfaithful to these judicial interpretations of NEPA. The court did not even consider whether a "worst case analysis" with respect to the proposed use of herbicides was necessary because it could reasonably affect the agency's decision to proceed with its spraying program. Compare *Baltimore Gas & Electric Co.* v. *NRDC*, slip op. 12-13. Instead, the court focused solely upon 40 C.F.R. 1502.22, as though it had a life independent of NEPA. The court's conclusion that the language of the regulation could be construed to embrace the BLM's spraying proposal not only overlooks the fact that 40 C.F.R. 1502.22 is not an extension of NEPA but merely implements it (see *Sierra Club* v. *Sigler*, 695 F.2d 957, 971 (5th Cir. 1983); App., *infra*, 4a), but also is inconsistent with the decisions cited above holding that NEPA does not require an agency to consider environmental impacts that are merely remote possibilities.[9]

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[9] The regulation does not require a worst case analysis whenever there is uncertainty. A worst case analysis is required only if the information is "essential to a reasoned choice among alternatives" but its cost is exorbitant; or the information "relevant to adverse impacts is important to the decision" and there is no known way to obtain the information. 40 C.F.R. 1502.22(b)(1) and (2). In either event, the agency must still exercise discretion to decide for itself whether the information is important or essential to a decision. Both courts below analyzed this issue as if they were exercising de novo review. They analyzed the scientific evidence and concluded that the uncertainty warranted further inquiry. But this Court has repeatedly emphasized that with respect to technical matters surrounded by scientific uncertainty reviewing courts should defer to the agency's expertise and not substitute their judgment for that of the agency.

The only other court of appeals to interpret 40 C.F.R. 1502.22 has recognized that the regulations do not require analyses of wholly improbable consequences. In *Sierra Club* v. *Sigler*, *supra*, the court held that the Corps of Engineers erred in not producing a worst case analysis before deciding whether to build an offshore "superport" oil terminal. The court found that a catastrophic oil spill was a real possibility and that an analysis of the effects of a spill beyond a 24-hour period was beyond the state of the art of forecasting. The court therefore concluded that an analysis of such a spill was precisely what the worst case regulation intended. 695 F.2d at 972. The court stressed that its reasoning was limited to situations "where a real possibility of the occurrence *has been proved* and a data base for evaluating its consequences established." 695 F.2d at 975 n.14 (emphasis added).

In this record, there is no credible, scientific evidence that 2,4-D or any of the other proposed herbicides has any carcinogenic effects; and there is certainly no data base upon which any meaningful evaluation of the carcinogenic consequences of these herbicides can be based.[10] Instead, contrary to the reasoning in *Sigler*, the court below has ordered BLM to "concern itself with phantasmagoria hypothesized without a firm basis

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See *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, No. 82-1005 (June 25, 1984), slip op. 26-27; *Baltimore Gas & Electric Co.*, slip op. 13; *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 557-558. Although BLM has no special expertise in evaluating the environmental risks of herbicides, EPA does and it has registered all of the herbicides that were proposed for use by the BLM. See page 14, *infra*.

[10] The district court concluded solely on the basis of the expert testimony that there was scientific uncertainty that compelled the BLM to conduct its worse case analysis. Courts are hardly well suited for making such judgments after a trial. See *Commonwealth of Kentucky ex rel. Beshear* v. *Alexander*, 655 F.2d 714, 720 (6th Cir. 1981) ("Mere disagreement among experts will not serve to invalidate an EIS.").

in evidence and the actual circumstances of the contemplated project, or with disasters the likelihood of which is not shown to be significantly increased by the carrying out of the project." 695 F.2d at 975 n.14. Cf. *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).[11]

b. Another fundamental flaw in the court of appeals' analysis is its conclusion that BLM, when deciding whether to spray with registered herbicides, should independently evaluate the possible carcinogenic effects of the herbicides. This holding undermines EPA's decision under FIFRA to register these products for the very uses BLM proposed to make—a decision based on the very scientific inquiry the court has now ordered BLM to undertake. It is wholly implausible that Congress would, on the one hand, create an elaborate registration process for pesticides and put that process in the charge of the agency most capable of evaluating the environmental effects of using pesticides, and, on the other hand, also require each federal agency proposing to use a pesticide to replicate EPA's efforts before going forward.

In 1947, Congress enacted FIFRA, and in 1970, the Environmental Protection Agency was given responsibility for enforcing its registration and labeling require-

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[11] In *CATS I*, 428 F. Supp. at 933, the district court carefully limited its injunction to halt the spraying of 2,4,5-T and Silvex, which contain TCDD; the court expressly excluded 2,4-D from its order.

By contrast, in *Save Our Ecosystems* v. *Clark*, No. 83-3908, (9th Cir. Jan. 27, 1984), the court of appeals found inadequate a worst case analysis prepared by BLM in response to the district court's decision in this case. The court of appeals held that any possible effect on human health, no matter how unsubstantiated or speculative, must be considered a significant impact. As such, the agency is required to analyze that possible effect under NEPA. Thus, the law of the circuit is that until an agency can prove that a herbicide does not cause cancer in humans, it must assume that it does. This assumption must be made even if, as in this case, there is no credible scientific evidence to support such an assumption.

ments. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15625 (1970). Soon thereafter, Congress amended FIFRA by adopting the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 *et seq.* See *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 3-4. The 1972 amendments contained a comprehensive revision of FIFRA designed to strengthen the EPA's ability to protect the environment from a wide variety of potentially hazardous pesticides, including herbicides. See *Ruckelshaus* v. *Monsanto Co.*, slip op. 3; S. Rep. 92-838, 92d Cong., 2d Sess. 3-9 (1972); H.R. Rep. 92-511, 92d Cong., 1st Sess. 5-13 (1972).[12]

The amendments established new substantive criteria for FIFRA registration; EPA is now permitted to register an herbicide only after determining that the use of the herbicide would not cause "unreasonable adverse effects on the environment" (7 U.S.C. 136a(c)(5)(C)-(D)). The statute defines unreasonable adverse effects on the environment as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide" (7 U.S.C. 136(bb)). In order to determine if a pesticide will cause unreasonable adverse effects on the environment, EPA considers information from all available sources, including data submitted by the producer, with respect to the chemical nature and structure of the pesticide, as well as test results on the potential dangers of the product. These tests include acute toxicity studies, chronic toxicity studies (including research on carcinogenic effects), residue studies, environmental chemistry studies, and fish and wildlife studies. See 47 Fed. Reg. 53192-53221 (1982).[13]

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[12] The term "pesticides" includes herbicides. See Section 2(u) of FIFRA, 7 U.S.C. 136(u); 40 C.F.R. 162.3(ff)(9), 162.14(a) and (b)(3).

[13] The statute also authorizes EPA to require additional data from registrants who wish to maintain existing registrations, 7

At any time after a registration has been issued, the Administrator may issue a "Rebuttable Presumption Against Registration" (RPAR) notice based on a "validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or to the environment." 7 U.S.C. 136a(c)(8). EPA has adopted regulations setting out the criteria for determining what are unreasonable adverse effects. 40 C.F.R. 162.11. The regulations require the Administrator to issue an RPAR notice whenever "a pesticide's ingredient(s), metabolite(s), or degradation product(s) meet or exceed any of the * * * criteria for risk, as indicated by tests conducted with the animal species and pursuant to the test protocols specified in the Registration Guidelines, or by test results otherwise available." 40 C.F.R. 162.11(a)(3). The criteria include both acute toxicity and chronic toxicity (including carcinogenic effects). 40 C.F.R. 162.11(a)(3)(i)-(ii).[14]

None of the herbicides BLM proposed to use in Western Oregon has had an RPAR issued against it. Nor is there any evidence that a petition has even been filed asking EPA to consider suspending the registration of these herbicides.

U.S.C. 136a(c)(2)(A)-(B), and requires a registrant, after registration, who receives or discovers additional factual information regarding unreasonable environmental effects to submit the new data to EPA. 7 U.S.C. 136d(a)(2). Congress also authorized EPA to classify a pesticide for restricted use only, 7 U.S.C. 136a(d), to suspend any or all uses of a registered pesticide, 7 U.S.C. 136d(c), and, if necessary, to cancel a registration, 7 U.S.C. 136d(b). The statute also allows a substance to be conditionally registered, but only after EPA determines that such registration for use will not significantly increase the risk of unreasonable adverse effects on the environment. 7 U.S.C. 136a(c)(7).

[14] The public has an opportunity to participate at the various stages of the FIFRA process. See., *e.g.*, 40 C.F.R. 162.6(b)(6), 164.20, 166.10. In addition, EPA's refusal to suspend or cancel a registration is subject to judicial review. 7 U.S.C. 136n.

Obviously, EPA's registration of an herbicide is not a guarantee of safety to either man or the environment. We recognize that in some cases a substance will be registered, even though it is known to cause serious environmental effects, on the basis that the benefits outweigh the risks. FIFRA requires the EPA, however, to balance the benefits against the risks on a use-by-use basis. This balancing process constitutes the core of FIFRA, and reflects the two concerns that most seriously animated Congress in passing the 1972 amendments: the need to use pesticides and the concern over possible environmental damage.[15] For example, a substance known to be harmful to man may be approved for use only in unpopulated areas, and only if it is the only substance known to be effective in eliminating a specific pest. This use restriction appears on the label, and failure to follow the label restrictions is unlawful. 7 U.S.C. 136j(a)(2)(G). This balancing process that EPA is required by FIFRA to follow effectively replicates the analytical and procedural examination called for by NEPA.[16]

The FIFRA process constitutes, in effect, the functional equivalent of an EIS for the use of a particular herbicide. See *Wyoming* v. *Hathaway*, 525 F.2d 66, 71-72 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976). See also *Environmental Defense Fund, Inc.* v. *EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973); *Portland*

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[15] See S. Rep. 92-838, 92d Cong., 2d Sess. 3 (1972).

[16] Section 101(2)(C) of NEPA requires in part: "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." Here, BLM provided a copy of the draft programmatic EIS to the Environmental Protection Agency for its comments. EPA commented that the draft EIS was "most satisfactory * * * in terms of fairly presenting the basic known risk/benefit issues of the use of the ten herbicides which have been proposed for various spray projects" (*Final Environmental Statement 20*).

Cement Ass'n v. *Ruckelshaus*, 486 F.2d 375, 383-384 (D.C. Cir. 1973); S. Rep. 94-452, 94th Cong., 1st Sess. 9 (1975) ("[b]ecause the basic thrust and principal responsibility of EPA are to protect the environment, the Committee does not see a need to broaden the [economic] impact statement [for FIFRA registrations] to include the environment"). If EPA had prepared EIS's to accompany its FIFRA determinations for these herbicides, no one could argue credibly that BLM is required to replicate those studies in another round of EIS's. Indeed, CEQ regulations explicitly sanction reliance by one agency on another agency's environmental analysis. See 40 C.F.R. 1506.4. Such reliance is equally appropriate with respect to EPA's review of pesticides, because the agency's process, by satisfying the statutory demands of FIFRA, is consistent with the essential purpose of NEPA to assure that agencies consider environmental impacts prior to taking some action.

We are not contending that FIFRA absolves the proposing agency, here the BLM, from conducting a thorough examination of the probable environmental impacts of its specific spraying proposal. Questions such as where a pesticide should be used and just how it should be applied should be—and were—appropriately considered in environmental assessments prepared by BLM. In addition, the agency properly conducted a comprehensive search of published scientific literature on the possible health impacts of the spraying and updated that search yearly. See page 4, *supra*. We submit that these analyses by BLM, coupled with EPA's registration of the herbicides, satisfied NEPA.

To require BLM, as the court of appeals does, to go beyond this and to speculate about highly improbable and catastrophic events will not further NEPA's purpose of informing decision makers. Instead, it will merely mislead and confuse both decision makers and the public. An agency can expect misinformed, but strong, public opposition to a herbicide spraying program by assuming the "cancer at any dose" worst case

that is implicitly required here and explicitly required in the court of appeals' later decision in *Save Our Ecosystems* v. *Clark*, No. 83-3908 (9th Cir. Jan. 27, 1984).[17] Such an assumption will inevitably and wrongly lead the public to believe that the herbicides EPA has registered and the BLM has proposed to use are substantially carcinogenic substances. While the court's desire to see agencies consider "all possible long-range" environmental effects is perhaps understandable, such an examination is simply not required by NEPA.[18]

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[17] In *Save Our Ecosystems* v. *Clark*, No. 83-3908 (9th Cir. Jan. 27, 1984), the court rejected as inadequate BLM's worst case analysis for use of 2,4-D. In so doing the court stated (slip op. 23-24 n.9):

> More and more chemicals are added to our environment daily without adequate information about the long-range effects on health and environment. The EPA, in effect, acknowledges that data on the herbicides in this case are inadequate since the registration is conditional under an exception to the normal registration process.
>
> * * * * *
>
> Allowing administrative agencies to go ahead with programs without carefully considering *all possible* long-range effects of these chemicals would be contrary to the purposes of NEPA. If the BLM is to go ahead with the project in the face of these uncertainties, at least it must do so knowing the fate to which it may be condemning future generations.

The Secretary's Petition for Rehearing is still pending in that case.

[18] Given the statutory scheme, the court of appeals' requirement that BLM should not rely on FIFRA registration conflicts with this Court's admonition in *Metropolitan Edison Co.* v. *PANE*, slip op. 9, that courts should not require federal agencies "to expend considerable resources developing * * * expertise that is not otherwise relevant to their congressionally assigned functions." The primary congressionally assigned function of BLM is to protect and manage the Nation's public lands. Congress has assigned to EPA the task of determining which herbicides may be introduced into the environment. The court's decision upsets this congressionally-created scheme and forces federal agencies to expend resources developing toxicological expertise not otherwise relevant to their assigned functions (see

c. The only support the court of appeals offered for disregarding EPA's assessment of the environmental impact of herbicides was a prior Ninth Circuit decision, in which the court had said that "'[o]ne agency cannot rely on another's examination of environmental effects under NEPA'" (App., *infra*, 8a, quoting *Oregon Environmental Council* v. *Kunzman*, 714 F.2d 901 (1983)).

This conclusion is, of course, directly contrary to the CEQ regulation permitting one agency to rely on another's environmental analysis. See 40 C.F.R. 1506.4. If, however, the *Kunzman* court meant merely to say that one agency cannot completely delegate its NEPA obligations to another, its statement has no relevance to this case. BLM has evaluated all significant environmental effects that might reasonably follow from the site specific uses of herbicides (see page 4, *supra*).

Further, the ultimate authority for the "independent assessment" rule—the D.C. Circuit's decision in *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Comm'n*, 449 F.2d 1109 (1971)—has been repudiated by Congress. In *Calvert Cliffs'*, the court held, inter alia, that the Atomic Energy Commission (AEC) had violated NEPA by refusing to examine actual impacts on water quality caused by operation of a nuclear power plant. The AEC had refused to consider water quality impacts as long as the power plant met water quality standards set by the "appropriate agency." 449 F.2d at 1122. The court held that NEPA required the AEC to conduct its own analysis of water quality impacts. *Id.* at 1123.

Thereafter, Congress passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No.

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pages 20-21, *infra*). Courts should not "'attribute to Congress the intention to * * * open the door to such obvious incongruities and undesirable possibilities.'" *Metropolitan Edison Co.* v. *PANE*, slip op. 9 (quoting *United States* v. *Dow*, 357 U.S. 17, 25 (1958)).

92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*, which comprehensively restructured the Nation's efforts to combat water pollution. In those Amendments Congress provided that nothing in NEPA authorized any federal agency either to review the adequacy of any water quality certification granted under the Act or to impose any effluent limitation other than that allowed by the Act. 33 U.S.C. 1371(c)(2)(A)-(B). In explaining this provision, the chief proponent of the original amendment, Senator Baker, citing the "far-reaching" *Calvert Cliffs'* decision, stated:

> My amendment would make it clear that for the purposes of making the kind of "balancing judgment" required by NEPA, each individual Federal permitting and licensing agency would not be required to develop its own special expertise with respect to water quality considerations.

See H.R. Rep. 92-911, 92d Cong., 2d Sess. 138 (1972), *reprinted in* Staff of Senate Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 825 (Comm. Print 1973) [hereinafter cited as *Leg. Hist.*]. See also *Leg. Hist.* 182, 198, 202, 236.[19] Simi-

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[19] Even before the amendments, the Chairman of the CEQ had concluded that NEPA did not require each agency to conduct an independent assessment of environmental effects. In hearings before the Senate, Dr. Train commented:

> I do not believe the statute [NEPA] contemplates the duplication of expertise within the Federal Government.
>
> Obviously we would end up with every agency having to maintain a scientific staff that would duplicate every other agency, and I do not think anyone contemplates this, so, necessarily, I think it is implicit that in general there should be an ability on the part of the originating agency to accept, unless there is clear evidence of abuse of discretion, or something of that sort, the recommendation of the expert agency, but with all that, I still say that the responsible program agency cannot abrogate its overall responsibility to weigh all factors involved in reaching its decision.

larly, in the floor debates, Representative Dingall stated (*Leg. Hist.* 256):

> Section 511(c)(2) [33 U.S.C. 1371(c)(2)] seeks to overcome that part of the *Calvert Cliffs* decision requiring AEC or any other licensing or permitting agency to independently review water quality matters. But it does not affect the obligations of those agencies to consider alternatives and other environmental matters, such as esthetics, fish and wildlife, and so forth.

Congress's judgment in the 1972 amendments, although not controlling with respect to FIFRA, nevertheless represents a common sense rejection of the reasoning of the court below. It is simply unreasonable to assume that Congress somehow intended for BLM to disregard EPA's expertise on an issue committed to EPA's care.

2. The decision of the court of appeals will increase substantially the burden of governmental compliance with NEPA. The court has rejected BLM's reliance on EPA (together with BLM's supplemental use of a literature review) as an appropriate basis for deciding which herbicides, if any, to use on various sites. Accordingly, BLM must now conduct its own independent research on the health effects, particularly carcinogenic effects, of herbicides. This implicit requirement in the decision below was made explicit in the court's subsequent decision in *Save Our Ecosystems* v. *Clark*, slip op. 12-14.

BLM has estimated that such research would take at least five years to produce any meaningful result and would cost between $5 and $7 million annually. Even if BLM possessed the statutory and budgetary authority to conduct such research, it would still be forced to

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National Environmental Policy Act: Joint Hearings Before the Senate Comm. on Public Works and the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 19 (1972).

forgo using herbicides on the O&C Act lands for a minimum of five years. In its environmental impact statement BLM estimated that not using any herbicides would reduce annual timber yields on O&C Act lands by 25% resulting in revenue loss to federal and local governments in excess of $20 million per year. *Final Environmental Statement* 8-44. In addition to this loss, BLM anticipated that a substantial number of acres of public grazing land would be lost because of the spread of weeds noxious to domestic livestock. In addition, thousands of lumber-related jobs would be lost in the region. *Id.* at 8-42, 8-43 to 8-44.[20]

The research requirement imposed by the court of appeals will also burden other federal agencies. (It immediately affects the Forest Service, which is a party in *Save Our Ecosystems*.) Many federal agencies use herbicides: the Department of Defense uses herbicides to control vegetation within its various installations; the Drug Enforcement Administration uses herbicides as a major weapon in its attempts to eradicate illegal marijuana farms; and the Army Corps of Engineers uses

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[20] Since the court of appeals' decision, a district court in Oregon has enjoined all herbicide use by BLM in Oregon and by the Forest Service in Oregon, Washington, and northern California. In issuing the injunction the district court stated that the court of appeals' decision in *SOCATS* left it no choice but to issue a total ban on herbicide use by the two agencies. *Northwest Coalition for Alternatives to Pesticides* v. *Block*, Civ. No. 82-6272 (D. Or. Jan. 6, 1984), appeal pending, No. 84-3821 (9th Cir.). The potential revenue loss attributable to *SOCATS* will thus be substantially greater than that estimated initially. We can expect other district courts in the circuit to follow suit. In addition, the worst case analysis issue is being increasingly used in the Ninth Circuit and other jurisdictions to halt proposed federal projects. See *Committee for Integrated Pest Management* v. *Block*, Civ. No. 82-0570 (D. N.M. Mar. 5, 1984); *National Wildlife Federation* v. *United States Forest Service* Civ. No. 82-1153-50 (D. Or. Aug. 6, 1984), as amended on reconsideration.

herbicides to eliminate undesirable aquatic vegetation that constitutes a hazard to navigation. Under the court of appeals' ruling, each agency must now independently assess the safety of the herbicides it uses. Thus, to comply with NEPA, each agency must develop and maintain a scientific staff to duplicate the studies and research conducted by EPA pursuant to FIFRA. NEPA, which is a procedural statute, simply does not require this duplication of effort and waste of resources.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-3562
83-3655
DC# 79-1098-FR

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC., PLAINTIFF-APPELLEE AND CROSS-APPELLANT

v.

WILLIAM P. CLARK*, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS-APELLANTS AND CROSS-APPELLEES.

Appeal for the United States District Court
for the District of Oregon
District Judge Helen J. Frye, Presiding

[Argued and Submitted November 9, 1983]

OPINION

Before: WRIGHT, GOODWIN, and BOOCHEVER, Circuit Judges.

WRIGHT, Circuit Judge:

This case requires that we determine the adequacy of the environmental analysis performed by the Bureau of Land Management of the Department of the Interior for its herbicide spraying program in Oregon forests. The district court found that considerable scientific un-

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*Substituted for former secretary, James Watt. Fed. R. App. P. 43(c)(1).

certainty existed as to the safe level of exposure to the herbicides used. It enjoined the BLM from further spraying until it performs a "worst case analysis" under 40 C.F.R. § 1502.22.

The question is whether 40 C.F.R. § 1502.22 requires an agency to perform such an analysis when significant scientific uncertainty exists about the safety of a program and the uncertainty cannot be eliminated by further study. We conclude that it does.

I. FACTS

Southern Oregon Citizens Against Toxic Sprays, Inc. (SOCATS) is a non-profit corporation whose members live near or use forests designated for herbicide spraying by the BLM. The latter annually sprays forest lands near Medford to control non-commercial vegetation and to promote timber production.

The BLM filed a programmatic Environmental Impact Statement in 1978 to cover its spraying program for the following ten years. This program contemplated the use of Silvex, 2, 4-D, and 12 other herbicides. The EIS addressed only the human health effects of Silvex. It noted that no adverse effects for the other herbicides were known.

Subsequently, the use of Silvex was suspended by the Environmental Protection Agency. The BLM has continued to spray with the other herbicides and has filed annual Environmental Assessments (EAs) to update the 1978 programmatic EIS.

In its 1979 suit to enjoin further spraying, SOCATS complained that the environmental documents prepared by the BLM were inadequate. Both parties moved for summary judgment.

The district court reviewed supporting affidavits and concluded that there was uncertainty regarding the safety of 2,4-D in small dosages. It noted particularly statements by one of the BLM's experts, Dr. Dost, who admitted to uncertainty among the scientific community

as to the carcinogenicity of 2,4-D. The court held that the scientific uncertainty, coupled with the potential danger to human health, required a worst case analysis.

It granted summary judgment to SOCATS and enjoined the spraying from which the BLM has appealed.

SOCATS sought attorney fees under the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A) (Supp. 1983). The court held that SOCATS was the prevailing party but denied fees because the government's position was "substantially justified." *Southern Oregon Citizens Against Toxic Sprays* v. *Watt*, 556 F. Supp. 155 (D. Ore. 1983). SOCATS has cross-appealed.

II. ANALYSIS

A. The Need for a Worst Case Analysis

The "worst case analysis" regulation, 40 C.F.R. § 1502.22, was promulgated in 1979. It is part of the Council on Environmental Quality's (CEQ) comprehensive interpretation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA). The CEQ's regulations are binding on administrative agencies and are entitled to substantial deference in the courts. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

The worst case analysis regulation provides:

> *Incomplete or unavailable information.*
>
> When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.
>
> (a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

> (b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

40 C.F.R. § 1502.22.

The worst case analysis regulation codifies prior NEPA case law. *Sierra Club* v. *Sigler*, 695 F.2d 957, 971 (5th Cir. 1983). It requires disclosure and analysis of the "cost[s] of uncertainty—i.e., the costs of proceeding without more and better information." *Id.* at 970; *State of Alaska* v. *Andrus*, 580 F.2d 465, 473 (D.C. Cir.), *vacated in non-pertinent part sub nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978).

The district court found that scientific uncertainty exists as to the safety of the herbicides and held that § 1502.22 applies because the spraying program could have an adverse impact on human health.

The BLM does not appeal the court's factual findings. It contends that: (1) the district court erred in requiring a worst case analysis, without also finding that the worst case is *probable* or *reasonably likely* to occur; (2) a worst case analysis is not required because the herbicides are registered by the EPA under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.* (Supp. 1983) (FIFRA); and (3) the court erred in holding that the BLM must perform a worst

case analysis in an Environmental Assessment. We reject each contention.

1. The Worst Case Analysis Regulation Applies to the Herbicide Spraying Program

The district court held that scientific uncertainty about the safety of the herbicides mandates a worst case analysis, "since herbicide spraying may have a direct impact on human health." The BLM contends that it should not have to consider impacts that are, in its judgment, neither likely nor probable. It argues that the language "significant adverse *effects* on the human environment" in § 1502.22, limits that regulation to situations in which the effect is reasonably probable.

Two other courts have considered the need for a worst case analysis under § 1502.22. *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983); *Village of False Pass* v. *Watt*, 565 F. Supp. 1123 (D. Ak. 1983). Both decisions were rendered after the district court's decision here. Both support its interpretation of § 1502.22.

In *Sigler*, the Fifth Circuit held that the Army Corps of Engineers must analyze the "worst case" of a catastrophic supertanker oil spill when evaluating the environmental consequences of a proposed oil port. The court read § 1502.22 to require separate consideration of (1) the worst case and (2) "the probability or improbability of its occurrence." *Id.* at 974. It said: "that the possibility of a total cargo loss by a supertanker is remote does not obviate the requirement of a worst case analysis. . . ." *Id.*

In *Sigler*, the "worst case" was an event of low probability but catastrophic effects and the scientific uncertainty concerned those effects. In contrast, this case involves a lack of information about the probability of any adverse effect. A more closely analogous situation is found in *False Pass*.

False Pass involved the adquacy of an EIS for lease sales of off-shore oil deposits. The court concluded that lack of information about the effect of seismic testing on endangered whale populations triggered § 1502.22. 565 F. Supp. at 1149-53. The court gave the government two alternatives: (1) obtain the missing information or, if that proved impossible, (2) prepare a worst case analysis. *Id.* at 1153. In either case, the government was required to reconsider the wisdom of its program.

The district court holding here accords with those later cases and with a common sense interpretation of § 1502.22. The government did not challenge the court's finding that "there is uncertainty about what is the safe level of dosage—or if there is one." The possibility that the safe level of dosage for herbicides is low or nonexistent creates a possibility of "significant adverse effects on the human environment." 40 C.F.R. § 1502.22. This potential calls for a worst case analysis.

The BLM's contention that it need not analyze a "worst case" unless it is "probable" contradicts the clear language of § 1502.22. This section requires that the agency prepare a worst case analysis "*and* indicat[e] to the decisionmaker 'the probability or improbability of its occurrence.'" *Sigler*, 695 F.2d at 974 (emphasis in original) (quoting 40 C.F.R. § 1502.22). The agency may not omit the analysis only because it believes that the worst case is unlikely.

The cases cited by the BLM to support its refusal to consider effects that it considers improbable are easily distinguished. *Trout Unlimited* v. *Morton*, 509 F.2d 1276 (9th Cir. 1974) was decided prior to the 1979 CEQ regulations. It involved consequences of dam construction that were distantly connected to the agency action. 509 F.2d at 1284. There was no information gap as to the improbability of the consequences. Here, the potential effect flows directly from the proposed action and there is scientific uncertainty regarding its likelihood.

Warm Springs Dam Task Force v. *Gribble*, 621 F.2d 1017 (9th Cir. 1980), involved an information gap about the effect of a newly discovered fault system on a proposed dam. 621 F.2d at 1020-21. We noted that the original failure to discuss this danger violated NEPA, but held that the agency cured the defect by commissioning an extensive study that supplied the missing information. *Id.* at 1025-26. By eliminating the uncertainty, the agency essentially complied with 40 C.F.R. § 1502.22(a), which requires an agency to obtain information relevant to adverse impacts that "is essential to a reasoned choice among alternatives" when the cost of obtaining it is not exorbitant. It had no need to conduct a worst case analysis under § 1502.22(b).

Further, the BLM's contention that the worst case is improbable is unsupported by the court's unchallenged findings. The court found scientific uncertainty regarding the likelihood of the worst case occurring. The BLM's *belief* that its herbicides are safe does not relieve it from discussing the possibility that they are not, when its own experts admit that there is substantial uncertainty. When uncertainty exists, it must be exposed.

2. Registration of a Herbicide Under FIFRA Does Not Alter the BLM's Duty to Prepare a Worst Case Analysis.

The BLM and amicus Monsanto contend also that a worst case analysis is not required because the herbicides have been registered by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136, et seq. (Supp. 1983) (FIFRA).

This argument is foreclosed by *Oregon Environmental Council* v. *Kunzman*, 714 F.2d 901 (9th Cir. 1983), which involved the sufficiency of an EIS for the use of

pesticides that were registered under FIFRA. We said there:

> One agency cannot rely on another's examination of environmental effects under NEPA. . . . "Thus, the mere fact that a program involves use of substances registered under FIFRA does not exempt the program from the requirements of NEPA."

Id. at 905 (quoting *Citizens Against Toxic Sprays, Inc.* v. *Bergland*, 428 F. Supp. 908, 927 (D. Ore. 1977)). The BLM must assess independently the safety of the herbicides that it uses.

3. The Worst Case Analysis Regulation Applies to an Environmental Assessment (EA)

The BLM prepared a programmatic EIS in 1978 and annual EAs for individual applications. The original EIS was prepared before the effective date of the 1979 CEQ regulations. The district court held that the EIS was adequate. *See* 40 C.F.R. § 1506.12. It held, however, that subsequent EAs were deficient because they did not comply with § 1502.22.

The BLM argues that the regulation applies only "[w]hen an agency is evaluating significant adverse effects on the human environment *in an environmental impact statement*." 40 C.F.R. § 1502.22 (emphasis added). It notes that the regulation is codified in part 1502 of the CEQ regulations, which deals with impact statements. Therefore, the BLM contends, the regulation does not apply to EAs.

The district court rejected this argument and reasoned that the EA was an integrated part of the overall environmental analysis. This view more closely reflects the purposes of NEPA and the CEQ regulations.

"We start with the premise that a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions." *Warm Springs Dam*, 621 F.2d at 1023. This continuing duty is especially relevant where the origi-

nal EIS covers a series of actions continuing over a decade. *See* Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Policy Act Regulation*, 46 Fed. Reg. 18026, 18036 (1981) (CEQ, *Forty Questions*). In general, an EIS concerning an ongoing action more than five years old should be carefully examined to determine whether a supplement is needed. *Id.*

The CEQ regulations encourage agencies to "tier" their environmental impact statements "to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. § 1502.20. The BLM uses annual EAs to supplement its programmatic EIS. The EAs must discuss new circumstances or information "relevant to environmental concerns and bearing on the proposed action or its impact." 40 C.F.R. § 1502.9(c)(1)(ii).

An EA need not conform to all the requirements of an EIS. *Foundation for North American Wild Sheep* v. *United States Department of Agriculture*, 681 F.2d 1172, 1178 n.29 (9th Cir. 1982). The EA must support the reasonableness of the agency's decision not to prepare a new or supplemental EIS. *Id.* Together, the EA and the programmatic EIS must "provide the information 'necessary reasonably to enable the decision-maker to consider the environmental factors and to make a reasoned decision.'" *Oregon Environmental Council* v. *Kunzman*, 714 F.2d at 904. The label of the document is unimportant. We review the sufficiency of the environmental analysis as a whole.

The programmatic EIS and the EA were inadequate without a worst case analysis. Including a worst case analysis in the EA allows the BLM to consider the scientific uncertainty in the least cumbersome manner, without having to prepare a new or supplemental EIS.

See Warm Springs Dam, 621 F.2d at 1027 (Kennedy, J., concurring) (approving agency decision to respond to a new environmental concern without preparing a formal EIS or supplement).

We hold that the BLM must prepare a worst case analysis before it may resume spraying and the annual EA is an appropriate place to include it.

B. Denial of Attorney Fees

SOCATS cross-appeals from the court's denial of attorney fees sought under the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A) (Supp. 1983).

We review that decision for an abuse of discretion. *United States* v. *101.80 Acres of Land, More or Less, in Idaho County, Idaho*, 716 F.2d 714, 728 (9th Cir. 1983); *Foster* v. *Tourtellotte*, 704 F.2d 1109 (9th Cir. 1983). This standard applies even where summary judgment was granted in the underlying action. *See Foster*, 704 F.2d at 1110. The court's interpretation of the Act is subject to *de novo* review. *Id.* at 1111.

The Act authorizes attorney fees and expenses for prevailing parties in civil litigation involving a government agency unless the court finds that the agency's position was "substantially justified or that special circumstances would make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The test is one of reasonableness. To defeat an award, the government must show that "its case had a reasonable basis both in law and in fact." *Hoang Ha* v. *Schweiker*, 707 F.2d 1104, 1106 (9th Cir. 1983).

The district court determined that SOCATS was the prevailing party but held that the government's position was substantially justified. 556 F. Supp. at 157. It gave two reasons: (1) the BLM had prevailed on three out of four legal issues, and (2) § 1502.22 was a convoluted regulation which was difficult to interpret.

The first reason was improper. SOCATS' success on specific issues does not affect its status as a prevailing

party. *See Hensley* v. *Eckerhart*, ___ U.S. ___, 103 S.Ct. 1933 (1983). It also does not affect the substantial justification of the government's position. The four legal theories advanced by SOCATS were alternative approaches to a single desired remedy, an injunction against further spraying. SOCATS gained that remedy. The time spent by SOCATS on unsuccessful legal theories may be considered only in determining the amount of an award. *Id.* at 1943. *See* 28 U.S.C. § 2412(d)(1)(C).

To support its finding that the government's position was substantially justified, the trial court noted also the complexity of § 1502.22 and the absence of case law.

We do not agree that § 1502.22 is difficult to interpret. It is straightforward and means what it says. *Sierra Club* v. *Sigler*, 695 F.2d at 973. Much of the BLM's confusion about it was self-induced.

Nevertheless, we cannot say that the court abused its discretion by denying fees. The analysis required by the regulation is exceptional. F. McChesney, *CEQ's "Worst Case Analysis" Rule for EISs: "Reasonable" Speculation or Crystal Ball Inquiry?*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10069 (1983).

Further, the only reported case interpreting the worst case analysis regulation before this decision supported the government's position. *See Sierra Club* v. *Sigler*, 532 F. Supp. 1222 (S.D. Tex. 1982), *rev'd*, 695 F.2d 957 (5th Cir. 1983). With our limited scope of review, we affirm the court's decision to deny fees.

The situation on appeal is different. After the appellate decision in *Sigler*, the BLM had notice that its reading of § 1502.22 was untenable. It could also have consulted the CEQ's own interpretation of its regulations. *See* CEQ, *Forty Questions*, 46 Fed. Reg. at 18032. The Council stated explicitly that § 1502.22 applies to low probability/catastrophic impact situations, and to those where the probability of an impact is

unknown. *Id.* The government's position was no longer justified on appeal.

Within 30 days of this opinion, SOCATS will file with the clerk in quadruplicate a certificate upon which this court can base a fee award. *See* 28 U.S.C. § 2412(d)(1)(B). It will give the information required by *Kerr* v. *Screen Extras Guild*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). The BLM may respond within 21 days thereafter.

CONCLUSION

We affirm the decision that the scientific uncertainty regarding the safety of the BLM's spraying program requires it to prepare a worst case analysis.

We affirm the denial of attorney fees below. The judgment is modified to allow reasonable fees on appeal.

AFFIRMED AS MODIFIED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 79-1098FR

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, PLAINTIFF

v.

JAMES WATT, SECRETARY OF THE INTERIOR; ROBERT BURFORD, DIRECTOR, BUREAU OF LAND MANAGEMENT; WILLIAM LEAVELL, STATE DIRECTOR FOR OREGON, BUREAU OF LAND MANAGEMENT; HUGH SHERA, DISTRICT MANAGER FOR MEDFORD DISTRICT, BUREAU OF LAND MANAGEMENT; IN THEIR OFFICIAL CAPACITIES AND INDIVIDUALLY; DEFENDANTS

OPINION AND ORDER

FRYE, JUDGE:

Plaintiff challenges the adequacy of the Environmental Impact Statement (EIS) and the subsequent Supplemental Environmental Assessment (SEA) and Finding of No Significant Impact (FONSI) prepared by defendants in support of their herbicide spraying program in Jackson and Josephine counties of Oregon (Medford District). Plaintiff seeks to enjoin defendants from further spraying until adequate documents have been pre-

pared. Both parties have moved for summary judgment.

FACTS

Plaintiff is Southern Oregon Citizens Against Toxic Sprays, Inc., a non-profit corporation whose members live in Jackson and Josephine counties and use the public forests for recreation, food gathering, and employment. Many live near sites designated for herbicide spraying. Defendants spray the public forest lands annually in the Medford District with various herbicides as part of their program of vegetation management. The purpose of spraying with herbicides is to reduce the quantity of vegetation that is competing with the more desirable conifers, mainly Douglas fir. The spraying is intended to prepare sites for reforestation and to allow existing conifers to grow above competing vegetation.

In 1978 the United States Department of Interior, Bureau of Land Management (BLM), filed an EIS entitled *Vegetation Management with Herbicides: Western Oregon, 1978 through 1987.* This is a "program" EIS explained on page 1-1 of the EIS as follows:

> "The herbicide program described herein typifies the projected annual herbicide program. Therefore it is used as the basis for analyzing the environmental impacts that may be incurred during the 10-year period. This environmental statement is considered applicable for a 10-year period unless it is determined through the Bureau's annual review process that it does not adequately describe the environmental effects. The annual review process is accomplished by assessing the site specific environmental impacts of each districts [sic] herbicide program proposals. This assessment is described in a supplement to this Environmental Statement."

This program contemplated using the herbicide Silvex as well as 13 other herbicides including 2,4-D. The EIS devotes 15 pages to the human health effects of

Silvex, but does not address the human health effects of the other herbicides, except to conclude, "Except for Silvex, no potential long-term human health effects are known to result from the proposed action." The use of Silvex was thereafter suspended by the Environmental Protection Agency (EPA). The BLM has continued its herbicide program using the other herbicides, including 2,4-D.

This court is not to decide whether or not 2,4-D and the other herbicides are safe for use. The only issue before this court is whether defendants have complied with the procedural requirements of the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321, et seq., in determining whether to use 2,4-D and the other herbicides.

LEGAL ISSUES[1]

Plaintiff makes four arguments:[2]

1. The shift from Silvex to other herbicides is a major federal action significantly affecting the environment,

---

[1] Defendants contend that during the time for public comment on the EIS, plaintiff failed to present any comments as to the nature of 2,4-D similar to the allegations in its complaint and that plaintiff should be estopped to raise these allegations now. However, defendants admit that plaintiff has in a timely fashion exhausted its administrative remedies. Plaintiff therefore aptly characterizes defendants' contention as a type of laches defense. Plaintiff argues that its members have raised these same concerns over 2, 4-D at every opportunity and point to plaintiff's exhibits F and G showing lists of comments at the administrative level. Further, laches is not a favored defense in environmental cases. *Coalition for Canyon Preservation* v. *Bowers*, 632 F.2d 774, 779 (9th Cir. 1980). Defendants' defense of laches has no merit and will not be addressed further.

[2] Plaintiff also seeks a declaration of standing. Defendants do not dispute plaintiff's standing; therefore it is not an issue in this case.

thus necessitating the preparation of an EIS under 42 U.S.C. 4332(2)(C).

2. Each yearly spray proposal, and in particular the 1982 proposal for the Medford District described in SEA#OR-110-82-75, is a major federal action, thus necessitating the preparation of an EIS under 42 U.S.C. 4332(2)(C).

3. The defendants violated NEPA and regulations thereunder by failing to evaluate the human health effects of 2,4-D and other herbicides in the EIS.

4. Defendants violated 40 C.F.R. § 1502.22 by failing to include a "worst case analysis" in the Supplemental Environmental Assessment.

1. Does the shift from Silvex to other herbicides constitute a major federal action?

Plaintiff characterizes the shift from Silvex to other herbicides when Silvex was suspended by the EPA as "the equivalent, for NEPA purposes, of a brand new proposal to spray thousands of acres annually with 2,4-D, Picloram, Atrazine and other chemicals." Plaintiff argues that this change necessitates preparation of a new or a supplemental EIS, under 40 C.F.R. § 1502.9(C)(1).

Changes in a proposed government project may be so substantial as to require an additional or supplemental environmental impact statement. *Environmental Defense Fund* v. *Marsh*, 651 F.2d 983 (5th Cir. 1981). However, the defendants are not using any herbicides not mentioned in the final EIS. They have simply eliminated the one considered potentially harmful to human health. The herbicides used to replace Silvex are discussed in the EIS. Their properties remain the same whether they are used over 1,000 or 10,000 acres. The substitution of other herbicides for Silvex was considered as an alternative in the original proposal. This court concludes that this is not a substantial deviation

such as the court found in *Marsh, supra*. The change from Silvex to other herbicides is not a major federal action or a substantial change requiring preparation of a new or supplemental EIS.

2. Is the 1982 spray proposal for the Medford District a major federal action?

The 1978 EIS is a program EIS, designed to be applicable for ten years unless it is determined through an annual review process that it no longer adequately describes the environmental effects. Program EIS's are specifically provided for in NEPA's implementing regulation, 40 C.F.R. § 1500.4(i). The District Manager has made a finding that the proposed 1982 herbicide program for the Medford District does not involve significant impacts beyond those already analyzed in the EIS.

The spray proposal for 1982 for the Medford District is not a major federal action and therefore does not require preparation of a new or supplemental EIS.

3. Did defendants violate NEPA by failing to evaluate the human health effects of 2,4-D and other herbicides in the EIS?

The 1978 EIS only discusses the human health effects of Silvex. The EIS concludes, "Except for Silvex, no potential long-term health effects are known to result from the proposed action." EIS p. 6-3. Defendants contend that the concern of both the public and other agencies at that time was TCDD, a contaminant of Silvex, and no significant concern was expressed about the possible health risks of herbicides not containing TCDD.

An EIS need not discuss all possible environmental consequences of a given action. A reasonably thorough discussion of the significant aspects of the *probable* environmental consequences known at the time is all that is required by an EIS. *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). Since the EIS states that no long-term health effects are known to result

from the use of other herbicides, and since the defendants' duty is only to discuss *probable* effects known at the time, the failure to specifically deal with human health effects of 2,4-D and the other herbicides, while troublesome in retrospect, is not a violation of NEPA.

4. Did the defendants violate 40 C.F.R. § 1502.22 by failing to include a "worst case analysis" in the Supplemental Environmental Assessment?

Plaintiff argues that scientific uncertainty exists as to the human health effects of 2,4-D, therefore, pursuant to 40 C.F.R. § 1502.22, defendants had a duty to expose that uncertainty and to include a "worst case analysis" in the supplemental environmental documents, i.e., in the documents prepared after the EIS.

40 C.F.R. § 1502.22 provides:

"§ 1502.22 *Incomplete or unavailable information.*

"When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

"(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

"(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g. the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it

shall include a worst case analysis and an indication of the probability or improbability of its occurrence."

This regulation became effective July 30, 1979. 40 C.F.R. § 1506.12 provides:

"(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reason of these regulations.... However, nothing shall prevent an agency from proceeding under these regulations at an earlier time."

Defendants challenge the application of these regulations to any of the documents prepared in the herbicide program, since the draft EIS was prepared and filed prior to July 30, 1979.

This issue was addressed in *National Indian Youth Council* v. *Andrus*, 501 F. Supp. 649 (D. N. Mex. 1980). The court held that the two EIS's filed before July 30, 1979 were exempt from the 1979 regulations, but that the regulations applied to a FONSI and an EA prepared after July 30, 1979. The court stated:

"The first sentence of Part 1506.12 clearly states that the 1979 regulations are to be applied to 'the fullest extent practicable to ongoing activities and environmental documents begun before the effective date.' Both the FONSI and the EA are 'environmental documents' within the meaning of 40 C.F.R. Part 1508.10(1979)."

501 F.Supp. at 655. The 1982 SEA and FONSI in this case were filed after July 30, 1979. The regulations apply to them. Thus it is necessary to determine whether a "worst case analysis" should have been included in the supplemental documents.

The first part of 40 C.F.R. § 1502.22 provides that "When an agency is evaluating *significant adverse effects on the human environment* in an environmental impact statement ..." (emphasis added) certain steps must be taken by the agency. This court concludes that any potential harmful effect upon human health caused by herbicide spraying must be considered a significant adverse effect on the human environment. Therefore, the first part of § 1502.22 applies to this case.

The second part of 40 C.F.R. § 1502.22 provides "... and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists." In other words, an agency must make the public aware when it is contemplating action which may result in *significant* adverse effects on the human environment (in this case, human health) *and* either 1) there are gaps in the relevant information about the effects on the human environment of the action contemplated, or 2) there is scientific uncertainty about the effects on the human environment of the action contemplated. Furthermore, when there are informational gaps or uncertainties, the agency must either close those gaps or clear up those uncertainties or make a "worst case analysis" so that the agency can weigh the need to proceed against the risks of possible adverse environmental impacts.

This court must now determine from the affidavits and exhibits before it whether there are gaps in the information about the effects of 2,4-D or whether scientific uncertainties exist in the information about the effects of 2,4-D. The parties have agreed to this procedure.

Plaintiff contends that at any dosage level there are or may be adverse health effects caused by the use of the herbicide 2,4-D. Plaintiff also contends that there are gaps in the current literature about and studies of 2,4-D and that scientific uncertainty exists as to the ef-

fects of even small dosages. Defendants contend that the effects of 2,4-D upon human health depends on the level of dosage used. Defendants concede that there would be toxicity with high dosages, but that at the dosages used by the Forest Service there are no probable harmful effects of 2,4-D. Defendants stress that the Forest Service need address only the *probable* environmental consequences and not slim possibilities or suspicions. *Trout, Unlimited* v. *Morton, supra*. Defendants say that scientific uncertainty will nearly always exist to some degree.

Plaintiff has submitted the affidavits of two experts, Ruth Whisler Shearer and Melvin D. Reuber. Defendants have submitted the affidavits of four experts, Frank N. Dost, Logan A. Norris, Sheldon L. Wagner, and Harold Kalter. Both sides have submitted exhibits. Multiple affidavits have been submitted by both Dr. Shearer and Dr. Dost. Each challenges the other's conclusions and attempts to impeach the other's scientific credibility.

From reading the affidavits the court is convinced that there is scientific uncertainty or that gaps exist as to the effects of even small dosages of 2,4-D. Dr. Dost states in an article entitled "Toxic Hazards Associated with Use of Herbicides in Forestry," that:

> "There is presently valid scientific disagreement on the applicability of the threshold concept in assessing the dose necessary to initiate cancer. The reason is that cancer is a proliferative disease, and it is argued by some that any dose of a carcinogen, no matter how minute, has some finite probability of causing cancer. Evidence that this is not the case in higher animals is now in the process of publication. . . ."

"Toxic Hazards," p. 3. (*See also*, affidavit of Dr. Shearer, pp. 4-6) In his Reply Affidavit, Dr. Dost states, at p. 2:

> "I have not taken a position that a real threshold exists. My position in that particular regard is that the experimental evidence is not yet adequate to conclude that thresholds do or do not exist, and that point is made on page 5, lines 5-7 of my prior affidavit. The real scientific issue is whether, for chemicals of weak or questionable genetic activity, practical thresholds can be established at which the risk is so low as to be indistinguishable from zero."

In the same paper on Toxic Hazards, Dr. Dost states at p. 9:

> "2,4-D was registered long before such testing [for carcinogenic potential] was required, however, and studies of its carcinogenic potential were done much later. Those studies have evoked some dispute. The two experiments considered most useful ... are less comprehensive than current research standards dictate. Although they resulted in negative conclusions about the ability of 2,4-D to cause cancer, there has been an argument that re-examination of the pathology does show an increased incidence of tumors. These arguments have revolved principally around the contention of a single pathologist that his re-examination of the tissues does show evidence of carcinogenic change. Further examination by other consulting pathologists has not supported that opinion."

The "single pathologist" referred to is Dr. Reuber, one of plaintiff's two expert witnesses. Dr. Reuber discusses his review of the Federal Drug Administration rat study on 2,4-D. He disputes the conclusions of its authors that a carcinogenic effect of 2,4-D is not shown. While defendants have attempted to impeach Dr. Reuber's scientific credentials (*see*, defendants' exhibits 8 and 9), Dr. Dost's own statements indicate that there is some question in the scientific community as to the carcinogenicity of 2,4-D. On pp. 9-10 of his paper on Toxic Hazards, Dr. Dost notes that questions have

been raised by a Russian study (though the methodology is considered deficient) and by Swedish studies.

In 1980, EPA reviewed the health effects studies of 2,4-D, concluding that "significant information gaps exist on the effects of 2,4-D, preventing a definite conclusion on the safety of the herbicide," and requesting manufacturers to provide additional information. See attachment to Supplementary Affidavit of Dr. Shearer. After that announcement was made, a review of possible data gaps with 2,4-D was made by the Scientific Advisory Panel to EPA to determine test-requirements needed to support continued registration of the substance.[3] The Panel's report is Appendix III to Dr. Dost's Reply Affidavit. It shows that the Panel concurred in the EPA's determination that certain tests be carried out including tests for "oncogenicity," (tumor

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[3] In their final Reply Memo defendants argue that BLM is entitled to rely on the research and findings of EPA in its administrative proceedings regarding registration of herbicides and need not duplicate EPA's statutory function of determining the environmental safety of an herbicide. In opposition, plaintiff cites the case of *Citizens Against Toxic Sprays* v. *Bergland*, 428 F. Supp. 908 (D. Ore. 1977) in which Judge Skopil stated:

> "Nor can the Forest Service avoid its obligations under NEPA by arguing that any necessary scientific inquiry must be conducted by the EPA. NEPA mandates a case-by-case balancing judgment on the part of federal agencies. The only agency in a position to make such a judgment in a particular case is 'the agency with overall responsibility for the proposed federal action—the agency to which NEPA is specifically directed.' ... The responsible agency may not attempt to abdicate to any other agency merely because that agency is authorized to develop and enforce environmental standards. ... Thus, the mere fact that a program involves use of substances registered under FIFRA does not exempt the program from the requirements of NEPA. ... [citations omitted]

428 F. Supp. at 927. Defendants' argument has no merit.

promotion) as the information from existing studies is either insufficient or is disputed by Dr. Reuber.

The court concludes that there is scientific uncertainty about the carcinogenic and mutagenic potential of 2,4-D and there is uncertainty about what is the safe level of dosage—or if there is one. The degree of scientific uncertainty is sufficient since herbicide spraying may have a direct impact on human health to require a "worst case analysis" to be made. The probability of the "worst case" actually happening can then be assessed and risks evaluated if the Forest Service determines to proceed in spite of the uncertainty.

IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED. Defendants are enjoined from further spraying until they have fully complied with 40 C.F.R. § 1502.22.

DATED this 9th day of September, 1982.

/s/ _____

HELEN J. FRYE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-3562
83-3655
DC CV 79-1098 HJF

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INCS., PLAINTIFF-APPELLEE, CROSS-APPELLANT

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS-APPELLANTS, CROSS-APPELLEES

APPEAL from the United States District Court for the Portland District of Oregon

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 02, 1983

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-3562/3655

Southern Oregon Citizens Against Toxic Sprays, Inc., et al., plaintiffs-appellees, cross-appellants

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS-APPELLANTS, CROSS-APPELLEES

[Mar. 21, 1984]

ORDER

Before: WRIGHT, GOODWIN, and BOOCHEVER, *Circuit Judges.*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Goodwin and Boochever have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

National Environmental Policy Act of 1969, § 102, 42 U.S.C. 4332 provides in relevant part:

> § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts
>
> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposls for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (1) the environmental impact of the proposed action.
>
> (ii) any adverse environmental effects which cannot be avoided should be proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irriversible and irretrievable commitments of rescurces which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce

environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

Federal Insecticide Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.* provides in relevant part:

7 U.S.C. 136a(c)(5)

Approval of registration

The Administrator shall register a pesticide if he determines that, when considered with any restrictions imposed under subsection (d) of this section—

* * * * *

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

The Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide. Where two pesticides meet the requirements of this paragraph, one should not be registered in preference to the other. In considering an application for the registration of a pesticide, the administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy. If a pesticide is found to be efficacious by any State under section 136v(c) of this title, a presumption is established that the Administrator shall waive data requirements pertaining to efficacy for use of the pesticide in such State.

7 U.S.C. 136(bb)

Unreasonable adverse effects on the environment

The term "unreasonable adverse effects on the environment" means an unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.

7 U.S.C. 136(u)

Pesticide

The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant: *Provided*, That the term "pesticide" shall not include any article (1)(a) that is a "new animal drug" within the meaning of section 321(w) of title 21, or (b) that has been determined by the Secretary of Health and Human Services not to be a new animal drug by a regulation establishing conditions of use for the article, or (2) that is an animal feed within the meaning of section 321(x) of title 21 bearing or containing an article covered by clause (1) of this proviso.

7 U.S.C. 136a(c)(2)

(A) Data in support of registration

The Administrator shall publish guidelines specifying the kinds of information which will be required to support the registration of a pesticide and shall revise such guidelines from time to time. If thereafter he requires any additional kind of information under subparagraph (B) of this paragraph, he shall permit sufficient time for applicants to obtain such additional information. The Administrator, in establishing standards for data requirements for the registration of pesticides with respect to minor uses, shall make such standards commensurate with the anticipated extent of use,

pattern of use, and the level and degree of potential exposure of man and the environment to the pesticide. In the development of these standards, the Administrator shall consider the economic factors of potential national volume of use, extent of distribution, and the impact of the cost of meeting the requirements on the incentives for any potential registrant to undertake the development of the required data. Except as provided by section 136h of this title, within 30 days after the Administrator registers a pesticide under this subchapter he shall make available to the public the data called for in the registration statement together with such other scientific information as he deems relevant to his decision.

(B) Additional data to support existing registration

(i) If the Administrator determines that additional data are required to maintain in effect an existing registration of a pesticide, the Administrator shall notify all existing registrants of the pesticide to which the determination relates and provide a list of such registrants to any interested person.

(ii) Each registrant of such pesticide shall provide evidence within ninety days after receipt of notification that it is taking appropriate steps to secure the additional data that are required. Two or more registrants may agree to develop jointly, or to share in the cost of developing, such data if they agree and advise the Administrator of their intent within ninety days after notification. Any registrant who agrees to share in the cost of producing the data shall be entitled to examine and rely upon such data in support of maintenance of such registration.

(iii) If, at the end of sixty days after advising the Administrator of their agreement to develop jointly, or share in the cost of developing, data, the registrants have not further agreed on the terms of the data development arrangement or on a proce-

dure for reaching such agreement, any of such registrants may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. All parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator.

(iv) Notwithstanding any other provision of this subchapter, if the Administrator determines that a registrant, with the time required by the Administrator, has failed to take appropriate steps to secure the data required under this subparagraph, to participate in a procedure for reaching agreement concerning a joint data development arrangement under this subparagraph or in an arbitration proceeding as required by this subparagraph, or to comply with the terms of an agreement or arbitration decision concerning a joint data development arrangement under this subparagraph, the Administrator may issue a notice of intent to suspend such registrant's registration of the pesticide for which additional data is required. The Administrator may include in the notice of intent to suspend such provisions as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Any suspension proposed under this subparagraph shall become final

and effective at the end of thirty days from receipt by the registrant of the notice of intent to suspend, unless during that time a request for hearing is made by a person adversely affected by the notice or the registrant has satisfied the Administrator that the registrant has complied fully with the requirements that served as a basis for the notice of intent to suspend. If a hearing is requested, a hearing shall be conducted under section 136(d) of this title: *Provided,* That the only matters for resolution at that hearing shall be whether the registrant has failed to take the action that served as the basis for the notice of intent to suspend the registration of the pesticide for which additional data is required, and whether the Administrator's determination with respect to the disposition of existing stocks is consistent with this subchapter. If a hearing is held, a decision after completion of such hearing shall be final. Notwithstanding any other provision of this subchapter, a hearing shall be held and a determination made within seventy-five days after receipt for such hearing. Any registration suspended under this subparagraph shall be reinstated by the Administrator if the Administrator determines that the registrant has complied fully with the requirements that served as a basis for the suspension of the registration.

(v) Any data submitted uner this subparagraph shall be subject to the provisions of subsection (c)(1)(D) of this section. Whenever such data are submitted jointly by two or more registrants, an agent shall be agreed on at the time of the joint submission to handle any subsequent data compensation matters for the joint submitters of such data.

7 U.S.C. 136d(a)(2)

Information

If at any time after the registration of a pesticide the registrant has additional factual information regarding unreasonable adverse effects on the envi-

ronment of the pesticide, he shall submit such information to the Administrator.

7 U.S.C. 136a(c)(8)

Interim administrative review

Notwithstanding any other provision of this subchapter the Administrator may not initiate a public interim administrative review process to develop a risk-benefit evaluation of the ingredients of a pesticide or any of its uses prior to initiating a formal action to cancel, suspend, or deny registration of such pesticide, required under this subchapter, unless such interim administrative process is based on a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or to the environment. Notice of the definition of the terms "validated test" and "other significant evidence" as used herein shall be published by the Administrator in the Federal Register.

No. 84-267

In The

Supreme Court of the United States

October Term, 1984

WILLIAM P. CLARK, et al.,

Petitioners,

vs.

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Bureau of Land Management, in connection with its herbicide program, may disregard certain requirements of the National Environmental Policy Act of 1969 merely because the herbicides involved enjoy *pro forma* registration under the Federal Insecticide, Fungicide, and Rodenticide Act.

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No. 84-267

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Respondent and Plaintiff below, Southern Oregon Citizens Against Toxic Sprays, Inc. ("SOCATS") accepts the Statement of the Case (Petition, pp. 2-8), filed by Petitioners ("BLM"). The following augments that statement.

In its programmatic EIS the BLM admitted that wood-cutters, fishermen, hunters, hikers, and other users of the forest are expected to enter areas that have been sprayed with herbicides (App. 1). BLM further admitted that the herbicides can enter water supplies (App. 1). Numerous BLM records introduced in the trial court also showed that exposure of humans to herbicides can occur in unintended ways. Despite the "mitigation measures" envisioned by BLM, human exposure to herbicides in some dosage will occur.

In the district court, lengthy and detailed affidavits of SOCATS' toxicologists stated that it is now unknown whether there is a safe dosage of exposure to herbicides. Based on currently accepted data, science is unable to say that any threshold of human exposure exists below which genetic damage (e.g. cancer, mutations) does not occur.

BLM purported to disagree and to believe that low dosages of herbicides were safe. However, SOCATS learned BLM's chief affiant, Dr. Frank Dost. D.V.M., had himself earlier acknowledged that the existence of a safe threshold of exposure is uncertain. Based on the record before it, the district court thus made a finding that there is genuine scientific uncertainty about the health effects of herbicides and about the existence of a safe level of exposure (see Petitioner's App. 20a-24a). The BLM has not challenged that finding on appeal.

———o———

REASONS FOR DENYING CERTIORARI

SUMMARY OF ARGUMENTS.

The Court should not grant certiorari. The circuit courts are correct and in agreement about how to treat

important scientific uncertainty under NEPA and how to interpret 40 C.F.R. § 1502.22. The circuit courts agree that the unlikelihood of the worst case occurring does not relieve an agency from disclosing scientific uncertainty, nor from analyzing the potential worst case.

40 C.F.R. § 1502.22, a binding CEQ regulation, does not exceed the mandate of NEPA. The plain wording of the regulation is fully consistent with prior constructions of NEPA by this Court and others.

The mere registration of particular herbicides by EPA, as contemplated by FIFRA, does not alter BLM's obligations under NEPA and 40 C.F.R. § 1502.22.

I. The Circuit Courts of Appeal Are Not in Conflict.

The Circuit Courts are in agreement about the meaning of 40 C.F.R. § 1502.22.

Aside from the Ninth, only the Fifth Circuit has construed this regulation, and that circuit agrees with the Ninth. In *Sierra Club v. Sigler,* 695 F.2d 957 (5th Cir. 1983), the Army Corps of Engineers proposed to build an offshore oil terminal. A catastrophic oil spill was possible. Scientists were uncertain of the effects of such a spill and resolution of that uncertainty was beyond the state of the art. The Corps argued it had no duty to comply with 40 C.F.R. § 1502.22 merely because it believed that a catastrophic spill was unlikely, that its probability was remote.[1]

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1. To paraphrase BLM's basic argument in this case: "We feel that herbicides are probably safe in low dosages. Therefore, we need not reveal scientific uncertainty on that issue nor analyze the potential worst case that could occur if we are wrong. We do not have to comply with 40 C.F.R. 1502.22."

In rejecting the Corps' argument, the Fifth Circuit said:

> [T]he fact that the possibility of a total cargo loss by a supertanker is remote does not obviate the requirement of a worst case analysis . . . [The Corps' interpretation] of the regulation and the Plaintiff's burden under it reads the regulation out of existence. . . . Remoteness does not bar a worst case analysis so founded and should instead be weighed by the Corps when it applies the worst case analsis in its decision making process.
>
> *Sigler,* at 974.

The Ninth Circuit agreed in the instant case, and it expressly followed the rule of *Sigler.* It repeatedly cited the *Sigler* decision and Fifth Circuit's interpretation of 40 C.F.R. § 1502.22 as the controlling authority.[2]

BLM asserts that the *Sigler* decision required SOCATS to "prove" a "real possibility of the occurrence" to trigger the duty of 40 C.F.R. § 1502.22. This argument by BLM distorts the *Sigler* decision, and misapplies that decision to the facts of this case. In *Sigler,* the proposal was to build an oil terminal; in this case, to spray herbicides. In *Sigler,* a foreseeable result was a major oil spill; in this case, an admitted result is human contact with the herbicides. In *Sigler,* the effects of a major spill were irresolvably uncertain; in this case, the effects on humans of herbicide exposure are likewise uncertain. The two cases are factually similar.

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2. *"Sierra Club v. Sigler* . . . [supports] the district court's decision here" (See Petitioner's App. 5a); "The district court holding here accords with [*Sigler*]" (See Petitioner's App. 6a); "After the decision in *Sigler,* the BLM had notice that its reading of 1502.22 was untenable" (See Petitioner's App. 11a).

To be sure, in both cases, the plaintiffs must and did "prove" something. In *Sigler,* the plaintiffs proved that oil spills were to be expected. In this case, the plaintiff proved that the public would be exposed to herbicides.

SOCATS does not seek discussion of frivolous possibilities, such as whether herbicides could harm the Bigfoot, if that creature exists. Such a meaningless discussion adds a second layer of uncertainty and is clearly beyond the ambit of NEPA. In this case, however, it is agreed and "proved" that herbicides will contact the public. The only uncertainty is about what might happen next, and about whether there is a safe threshold dosage of exposure.

As in *Sigler,* science is unable to answer this important question. Therefore, the BLM must acknowledge the scientific uncertainty and analyze the worst case, just as the Army Corps had to do in *Sigler.*

This is the obvious and plain meaning of 40 C.F.R. § 1502.22.[3] To somehow require either plaintiff to "prove" that the worst case will occur is to pervert the clear intent of the regulation. Neither the occurrence nor the non-occurrence of the worst case *is* provable; if it were, 40 C.F.R. § 1502.22 would not be triggered. This was the reasoning of the Fifth Circuit in *Sigler* and the

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3. The CEQ's own explanation of 40 C.F.R. § 1502.22 supports the Circuit Court, and refutes the BLM's interpretation. The CEQ has made it clear that § 1502.22 applies to low probability/catastrophic impact possibilities. *Forty Most Asked Questions Concerning CEQ's NEPA Regulations,* 46 Fed. Reg. 18026, 18032 (1981).

CEQ's interpretation of NEPA deserves "substantial deference" from the courts. *Andrus v. Sierra Club,* 442 U.S. 347, 358 (1979).

Ninth Circuit in the instant case. The decisions are in harmony and correct. Thus, though BLM would portray a conflict in the Circuits, that conflict is illusory and needs no resolution by this Court.

II. The Circuit Court's Interpretation of 40 C.F.R. § 1502.22 Is Consistent With NEPA.

The regulation at issue, 40 C.F.R. § 1502.22 merely codifies a long and solid chain of case law. NEPA has always required that agencies discuss and evaluate important uncertainty.

As early as the decision in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973), it was held that:

> [O]ne of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry."

Id. at 1092.

In *Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir.) *vacated in non-pertinent part sub nom. Western Oil & Gas Assn. v. Alaska*, 439 U.S. 922 (1978), the circuit court stated, "One of the costs that must be weighed by decisionmakers is the cost of uncertainty—*i.e.*, the costs of proceeding without more and better information." *Id.* at 473. 40 C.F.R. § 1502.22 is merely an efficient mechanism to accomplish that weighing.

In *Baltimore Gas & Electric Co. v. NRDC*, — U.S. —, 76 L.Ed. 2d 437 (1983), the Nuclear Regulatory Commission had exhaustively studied the uncertain effects of the permanent underground storage of nuclear wastes. It had acknowledged this uncertainty, described the potential worst case (water seepage into bedded-salt repositories) and assessed the chances of the worst case occurring; in short, the agency had done precisely what 40 C.F.R. § 1502.22 requires. Though this Court properly declined to disagree with the NRC's substantive decision to proceed, it did hold that this underlying procedure of "consideration and disclosure [was] required by NEPA." *id.* 76 L.Ed. 2d at 447. It is therefore clear that 40 C.F.R. § 1502.22 merely implements what NEPA contemplates and does not exceed the mandate of NEPA. Thus, BLM's desire to remain silent as to potential effects it deems unlikely violates *both* NEPA and 40 C.F.R. § 1502.22.

Plaintiff freely admits that NEPA does not require discussion of all potential impacts, no matter how remote or frivolous. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974). However, as written and as interpreted below, neither does 40 C.F.R. § 1502.22 require such exercises in imagination. The regulation is self-limiting in that respect. Only scientific uncertainty which is "relevant" requires disclosure. 40 C.F.R. § 1502.-22. Only if unobtainable information is "essential to a reasoned choice," 40 C.F.R. §§ 1502.22(a) and 1502.22(b) (1), or is "important to the decision," must the agency publish a worst case analysis. 40 C.F.R. § 1502.22(b) (2).

The plain wording of the regulation thus places its effect squarely in the mainstream of NEPA. Frivolous concerns may be disregarded, but important and relevant

potential impacts must be scrutinized. It can scarcely be argued that cancer and mutations are not relevant or important.

Contrary to the BLM's assertion (Petition p. 22) this regulation will not require each agency to "develop and maintain a scientific staff" to do original animal test research on the effects of herbicides. One must remember that SOCATS does not ask BLM to solve the riddle of the safety of herbicides, but merely to acknowledge uncertainty and to describe the potential worst case. This requires no extra scientific staff, but merely the publication of a document and the exercise of candor.

The issue here is not the ultimate substantive question of the safety of herbicides, nor even the question of whether to use those herbicides, but rather the strict *procedural* compliance which NEPA has always demanded.

The regulation provides an efficient and streamlined mechanism for the consideration of scientific uncertainty, one that could actually decrease the burden on federal agencies devoid of a particular scientific expertise. An agency is given the option of publishing a worst case analysis. For this reason the only burden imposed by the regulation in the instant case is self-imposed. If BLM had merely complied with the plainly worded regulation and issued an adequate worst case analysis, it need not have missed a single day of spraying, regardless of the ultimate safety or hazard of herbicides.

III. The Registration of Herbicides Under FIFRA Is Irrelevant To This Case.

The BLM suggests that the fact that herbicides were registered by the Environmental Protection Agency under

the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 ("FIFRA") somehow negates NEPA, in whole or in part.[4] This is incorrect for several reasons.

First, as BLM admits (Petition, p.15), "EPA's registration of an herbicide is not a guarantee of safety to either man or the environment." FIFRA's standards for registration of chemicals are different and less primarily concerned with hazard to human health than is NEPA. A chemical may be registered under FIFRA merely if the benefits of its intended use outweigh its costs (including environmental costs). 7 U.S.C. §§ 136a(5) and 136(bb).

Since FIFRA calls for this balancing of costs and benefits before registration, it is possible that a registered chemical is highly hazardous to humans, but very efficient in its commercial use. It is likewise possible that the particular chemical was registered because it is of marginal benefit but is toxicologically benign.

Thus, at best, the mere fact of registration under FIFRA simply does not tell us much about the safety of a given chemical, since EPA's decision to register that

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4. In its Petition, BLM would characterize its attitude toward FIFRA registration as something less than complete reliance. ("We are not contending that FIFRA absolves the proposing agency, here the BLM, from conducting a thorough examination of the probable environmental impacts of its specific spraying proposal.") (Petition, p.16) However, the record in a related case shows that BLM's actual attitude is total reliance on FIFRA registration: "Simply stated, our position is: *that so long as herbicides are registered and approved for forestry use by EPA, BLM may appropriately use such chemicals within specified procedural safeguards.*" *Merrell v. Block*, 20 E.R.C. 1607, 1613, footnote 8 (9th Cir. 1984) *(citing BLM's Field Guide to Policies and Procedures Required for Vegetation Management with Herbicides in Western Oregon)* (emphasis in original).

chemical embraces many other concerns than safety. Even if FIFRA worked as Congress intended, it would fail to provide the "hard look" demanded by NEPA. *Kleppe v. Sierra Club,* 427 U.S. 390 (1976).

Second, and even more troubling, is the EPA's apparent failure to meet its duties under FIFRA as shown by unchallenged evidence in both the trial court and administrative records.

While this suit was in the district court, a special review of 2,4-D was completed by EPA. It showed "significant information gaps" on the effects of 2,4-D (a registered herbicide) "preventing a definite conclusion on the safety of the herbicide." (App. 2).

Further, a 1980 report from the General Accounting Office concluded that EPA's program of reregistration and reassessment of the safety of registered chemicals was then already hopelessly inundated with 35,000 registrations, which EPA had inherited from other agencies (App. 3-4). EPA was then behind schedule and could only "rubber stamp" existing registrations (App. 5-6).

To further aggravate the problem, in 1982, the Reagan administration began to cut drastically the EPA budget for FIFRA-related programs, including the registration review process (App. 7). BLM presented no evidence that the situation has improved.

Plaintiff's members repeatedly brought all this information to BLM's attention, but BLM continued to look no further than the mere fact of EPA registration.

Regardless of the nature of EPA's duties under FIFRA, EPA has not met those duties. Therefore, BLM's

reliance on EPA is misplaced and cavalier. EPA's practical problems of politics and budget simply prevent any conclusion that "registration means safety." The mere fact of *pro forma* registration of a particular herbicide does not remove uncertainty as to health effects when humans are exposed to that chemical. Existing registration, therefore, does not affect the strictly procedural obligations of 40 C.F.R. § 1502.22, nor cure BLM's failures to comply with that regulation and with NEPA.

CONCLUSION

For the reasons given above, respondent Southern Oregon Citizens Against Toxic Sprays, Inc.[5] asks that the Court deny the BLM's Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL JEWETT
Counsel of Record for Respondent
JERRY A. JACOBSON
RICHARD B. THIEROLF, JR.

5. SOCATS is a non-profit Oregon corporation. It has no parent companies or subsidiaries. SOCATS is a member of the Southern Oregon Regional Council of the Northwest Coalition for Alternatives to Pesticides, Inc., an Oregon non-profit corporation.

This listing is provided under Supreme Court Rule 28.1.

APPENDIX A

(Excerpts from BLM's final EIS, *Vegetation Management with Herbicides, Western Oregon,* 1978; a complete copy has been lodged with the Court by BLM).

from p. 3-93

WATER

Herbicides may get into water supplies by direct application to previously undetected areas of free water, drift from adjacent areas, leaching in shallow soils, and movement of herbicides to streams by mass overland flow resulting from periods of intense precipitation occurring shortly after application. These sources could introduce low levels of herbicides for short periods of time leading to a brief exposure of aquatic organizms (sic) or other water users in the immediate area. However, no measurable adverse impacts to organisms from these low levels have been identified.

from p. 5-3

The possibility exists that wood cutters, hunters, fishermen, hikers and berry pickers will cross through or be in areas proposed for herbicide treatment or treated with herbicides.

APPENDIX B

(Excerpt from an EPA news release, April 21, 1980. This news release is part of the trial court record.)

> Barbara Blum, Deputy Administrator of the U.S. Environmental Protection Agency, announced today that the Agency is requesting additional information from manufacturers to determine whether 2,4-D, a widely used herbicide, is safe for humans and the environment. "We have made this decision following a review of health effects studies of 2,4-D," Blum said. "The review showed that significant information gaps exist on the effects of 2,4-D, preventing a definite conclusion on the safety of the herbicide."

APPENDIX C

(Excerpts from a report by the Comptroller General of the United States entitled: *Delays and Unresolved Issues Plague New Pesticide Protection Programs,* February 15, 1980. This report is part of the trial court record.)

from p. 2

> On September 28, 1978, the Chairman, Subcommitte on Health and Scientific Research, Senate Committee on Labor and Human Resources, asked us to review several pesticide regulatory programs. The review was made because of his interest in the status of EPA's efforts to protect the public from potentially hazardous pesticides. The Chairman was concerned because our 1975 report on Federal pesticide registration . . . and a report of the Sub-committee on Administrative Practice and Procedure, Senate Committee on the Judiciary, disclosed that EPA needed to significantly upgrade its pesticide programs before they could be relied on to protect the public and the environment from exposure to hazardous pesticides.
>
> As agreed with the Chairman's office, our review concentrated on two fairly new pesticide programs—registration standards and rebuttable presumption against registration (RPAR). The former was designed to thoroughly reevaluate the safety of the estimated 35,000 pesticide products which the Government had registered during the last three decades. The latter, EPA designed to identify certain high-risk pesticides and, after public and industry input, to undertake risk/benefit analyses to determine whether the pesticides identified should be canceled, placed under restricted use, or left alone.

from p. 4

> After several false starts, dating back to 1975, EPA finally began in 1978, a registration standards

program to reassess the safety of the 35,000 pesticide products and their accompanying tolerances which the Government had registered (or approved) over the past three decades. The task is not easy. Registration standards will be a long and costly program spanning up to 15 years, involving hundreds of EPA and contractor personnel, and costing as much as $200 million. Although it is too early to predict the program's chances of success, the program is already 5 months behind EPA's schedule and has many other problems which must be corrected if it is to be effective in assuring that only reasonably safe pesticides are used in this country.

from p. 5

In a related matter, EPA has not finished examining the adequacy of its tolerance-setting procedures—something it first promised back in 1975. Until it thoroughly completes this task and tolerance reevaluations under registration standards, EPA cannot assure the public that tolerance levels are reasonably safe.

from p. 5

The registration standards program evolved from EPA's early failure to conduct an effective pesticide reregistration program. Under the 1972 FIFRA amendments, EPA was required to reregister, by October 21, 1976, the 35,000 pesticides previously registered by the Department of Agriculture (prior to December 1970) and EPA. Amendments in 1978 reaffirmed the need for the expeditious reregistration of pesticides but deleted the deadline requirement.

During 1975, two EPA officials started reviewing Agency files to determine whether required safety data was present. In May 1976, EPA formally established a task force to continue this reregistration effort. However, EPA officials mistakenly assumed that most of the data was scientifically valid. Accordingly, reviewers skimmed through the files to de-

termine whether data existed but generally did not review the data's quality.

An EPA official told us that this early attempt was a "rubber stamp" approach to reregistration. He also told us that EPA took this approach because of statutory time constraints and because EPA did not have sufficient resources to conduct a thorough reregistration program.

In August 1976, EPA, because of the criticism it was generating, halted its reregistration program without reregistering any pesticides. A summary of this criticism appeared in a March 1977 EPA report entitled, "FIFRA: Impact on the Industry"

"* * * Senate hearings, discussions with GAO and FDA concerning the reliability of certain data submitted to FDA, and a subsequent preliminary report of an independent toxicologist on a sample of pesticide data raised serious doubts about (1) the adequacy of the testing [data] in EPA files, and (2) the completeness of the Agency's own review and follow-up. Since then, in December 1976, the staff of the Senate Subcommittee on Administrative Practice and Procedure has issued a report stating that the Agency has, in fact, been negligent in its public duty by not reviewing all data in depth prior to reregistration."

EPA officials met several times in August 1976 to discuss the need for a more comprehensive reregistration program to overcome the deficiencies of the one just terminated. In September 1976, several officials proposed a plan to establish such a program and suggested that a permanent staff of about 60 scientists and program managers have responsibility for it. EPA management endorsed the program but failed to provide the staff to operate it.

In February 1977, pesticide officials presented another reregistration plan to EPA management to be carried out by a staff of about 90 people. This plan

was also not implemented, and the reregistration task force operated with a small staff until its demise in July 1978.

EPA began planning for what is now known as the registration standards program in 1977. EPA realized it needed to change its narrowly focused strategy toward reregistration and decided to (1) thoroughly reevaluate all health and safety data in its files and all published literature relating to a pesticide's uses, (2) restructure its reregistration program to concentrate on the estimated 514 active chemical ingredients in pesticides, instead of considering the merits of each of the 35,000 pesticide products separately, and (3) reassess the safety of the estimated 6,000 tolerances on food and feed products which the Government had approved over the last 30 years.

from p. 8

According to EPA officials, important health and safety studies for many of the registration standards pesticides are missing, precluding EPA from developing final registration standards and from unconditionally reregistering all pesticides. Therefore, EPA plans to issue interim registration standards on many pesticides and plans to direct the applicable pesticide firms to fill data gaps by locating or performing required studies and submitting them to EPA for review.

from p. 9

As of September 1979, EPA was already 5 months behind schedule in developing the first group of registration standards. Delays cost money and prevent EPA from reaching timely conclusions on the safety of previously registered pesticides. As a result, the public may be exposed to hazardous pesticides longer than necessary.

APPENDIX D

(Excerpts from Article, *Toxic Substances, Pesticides, and Hazardous Materials Highlights of President Reagan's Proposed Fiscal 1983 Budget,* Chem. Reg. Rep., February 12, 1982 (B.N.A.) This article is part of the trial court record.)

A 12 percent cut in Environmental Protection Agency staffing and funding for fiscal 1983 was proposed Feb. 6 as the Reagan Administration sent to Congress a budget request termed "tighter and more efficient" by an EPA official.

The $961.3 million operating budget requested by the President would be about $1.25 million, or 12 percent, lower than EPA's fiscal 1982 operating budget and $336 million, or 29 percent, less than the fiscal 1981 operating level.

The budget proposed cutting the toxic substances program by $8.8 million to $68.6 million, the pesticides program by $2.5 million to $50.8 million, and research and development activities by $62 million to $216 million.

The agency's full-time personnel level for fiscal 1983 would be 8,645, down 1,176 from fiscal 1982, with the toxics program losing 79 full-time employees, the pesticides program 84 employees, and research and development 251 employees. . . .

The fiscal 1983 budget proposal would significantly reduce funding for pesticide programs, bringing a fourth straight year of declining staffing levels for those programs. Staff levels in this area would be cut to 661 full-time positions—less than two-thirds of the 1,017 positions authorized in 1980. Funding would decline to $50.8 million, a 21 percent drop from 1980 levels.

For 1983, the major cuts come from:

The state grant programs. The Administration proposes to cut $1.8 million from enforcement grants and $500 million from certification and training grants. The enforcement cut would be offset by improvements in state priority setting that will "direct available resources to aspects of pesticides use that do the greatest harm," the agency said. States will be encouraged to impose fees to offset the cuts in certification and training funds.

The registration review process, where $558,000 and 35 staff positions would be cut. The EPA budget summary said the review process would be "streamlined to obtain strict adherence to legislative and administrative deadlines."

The registration standards development program, which would lose another 10 positions, but increase its efficiency, concentrating on "classes of pesticides with high exposure and potential hazard," the agency stated.

No. 84-267

IN THE

Supreme Court of the United States

October Term, 1984

WILLIAM P. CLARK, *et al.*,

Petitioners

v.

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL FOREST PRODUCTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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Amicus curiae National Forest Products Association urges the Supreme Court to grant the Solicitor General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTEREST OF *AMICUS CURIAE*

The National Forest Products Association ("NFPA") is a non-profit corporation founded to promote the conservation and renewal of forest resources and to improve

forest utilization and forestry practices. NFPA is a trade association which represents both: (1) individual member companies that manage forest lands and manufacture solid wood products; and (2) regional forest products trade associations. In total, NFPA represents more than 2,000 individual firms in the forest industry.

Members of NFPA purchase federal timber and are interested in maintaining the ability of the Bureau of Land Management ("BLM") and other federal land managing agencies to use safe and effective pesticides in managing federal forest lands. Many members of NFPA operate manufacturing facilities which depend substantially on timber resources purchased from BLM and other federal land managing agencies for raw material.

This brief is submitted by *amicus curiae* NFPA to urge the Supreme Court to grant the government's petition for a writ of certiorari and to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. If the decision below is allowed to stand, it (along with other decisions now pending on a motion for rehearing before the Court of Appeals for the Ninth Circuit) will significantly reduce the ability of BLM and other federal land managing agencies to manage their forest lands for timber production.

SUMMARY OF ARGUMENT

The court of appeals' misinterpretation of a federal agency's responsibilities under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, with regard to herbicide applications will cause substantial nationwide losses in forest productivity and jobs. *Amicus curiae* NFPA can speak to these impacts better than federal petitioners.

In addition, the court of appeals' dramatic and improper expansion of NEPA in this case is being applied in situations other than herbicide applications, unnecessarily delaying and increasing the costs of a variety of federal actions. Finally, the decision of the court of appeals would require federal agencies interested in using pesticides to replicate the costly and time-consuming health risk assessment already performed by the Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*[1]

The Court should grant the petition for a writ of certiorari, because without the Court's review, the substantial, nationwide problems caused by the court of appeals' decision will continue unabated.

ARGUMENT: REASONS FOR GRANTING THE PETITION

The Court of Appeals' Misinterpretation of NEPA Imposes Substantial and Unnecessary Costs on Agencies that Manage Federal Timber and on Individuals Dependent on a Reliable Supply of Timber from Public Lands

The decision of the court of appeals in this and subsequent cases misinterpreting and expanding NEPA, has virtually stopped vegetation management in federal forests nationwide.[2] In so doing, this decision will cause substan-

[1]FIFRA § 2(u) defines the term "pesticide" as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest . . . ." 7 U.S.C. § 136(u). "Pesticide," therefore, is a generic term including insecticide, herbicide, fungicide, etc.

[2]Three subsequent cases rely on this decision in determining a federal agency's NEPA responsibilities in a pesticide spray project. In *Merrell v. Block,* Nos. 83-3887 and 83-3916 (9th Cir. Jan. 27, 1984, *petition for rehearing pending)* the court of appeals held that BLM

tial, nationwide losses in: (1) productivity of federal forests; (2) availability of grazing lands (due to the spread of noxious weeds); and (3) opportunity for employment harvesting timber and manufacturing wood products. In addition, the public is faced with potentially higher costs for paper and solid wood products due to diminished supply of raw materials. These losses are avoidable because they have been caused by a misinterpretation and improper expansion of NEPA. Review by this Court is necessary to remedy the situation.

As a direct result of this and subsequent decisions in the Ninth Circuit, herbicide spraying on BLM and U.S. Forest Service lands in the Pacific Northwest has been enjoined. As an indirect result, the Forest Service announced on April 2, 1984 that "[a]ll aerial application of herbicides on [all] national forest lands will be deferred while the U.S. Department of Agriculture's Forest Service develops procedures to address recent court rulings . . . ."[3] More than six months later, that "deferral" remains in effect.

Herbicides are used to control vegetation which competes with commercial tree species for sunlight, water, and

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and the Forest Service relied too heavily on EPA data. In *Save Our Ecosystems v. Clark*, No. 83-3908 (9th Cir. Jan. 27, 1984, *petition for rehearing pending)* the court rejected as inadequate BLM's worst case analysis for use of the herbicide 2,4-D, prepared as a result of the instant case. In *Northwest Coalition for Alternatives to Pesticides v. Block*, Civ. No. 82-6272 (D. Ore. Jan. 6, 1984), *appeal pending*, No. 84-3821 (9th Cir.), a district court enjoined all herbicide use by BLM in Oregon and by the Forest Service in Oregon, Washington, and northern California stating that the court of appeals' decision in the instant case left it no choice but to issue a total ban on herbicide use by the two agencies.

[3]United States Department of Agriculture, Forest Service to Defer Aerial Application of Herbicides, Press Release No. 342-84, April 2, 1984.

soil nutrients. Herbicides are not applied to all forest lands, just to those which need them. Furthermore, even in those areas where herbicides are necessary they are commonly used no more than twice in a tree's growing cycle of 50 years or more. Vegetation management with herbicides in areas where it is needed can double forest productivity.[4] In areas most critically in need of vegetation management, a single application of a herbicide can make the difference between a forest with a considerable commercial value and one with little or no commercial value at all.

Congress requires that both BLM and the Forest Service manage some of their lands for the supply of timber on a sustained basis.[5] This decision threatens to seriously diminish the ability of these agencies to carry out their Congressional mandate to manage timber. Failure to carry out that mandate is more than a philosophical or theoretical problem. For example, BLM estimated that a ban on herbicide use would reduce annual timber yields on its lands in Oregon covered by this case by 25%, resulting in re-

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[4]"[C]onifer volume in a stand can be doubled by controlling weed trees and shrubs . . . ." See R. Stewart, Timber Management Research, United States Department of Agriculture, Forest Service, Effect of Weed Trees and Shrubs on Conifers – A Bibliography with Abstracts (1981).

[5]BLM is required by the Oregon and California Railroad and Coos Bay Wagon Road Grants Lands Act of 1937, 43 U.S.C. § 1181a *et seq.*, to manage public timberlands in western Oregon for the purpose of providing a "permanent source of timber supply . . . and contributing to the economic stability of local communities and industries . . . ." 43 U.S.C. § 1181a. In the very statutory section in which Congress established the national forest system in 1897, it declared that one of the purposes of the national forest is "to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ." Organic Administration Act of 1897, 16 U.S.C. § 475.

venue loss to federal and local governments in excess of $20 million per year.[6]

Federal timber managers will also incur increased administrative costs as a result of the court of appeals' decision. These agencies will have to rewrite federal timber sale offerings and possibly forest planning documents to reflect reduced estimates of forest productivity and reduced ability (without herbicides) to regenerate the forest after harvest.

An additional, though less quantifiable, impact of the decision of the court of appeals is the delay, uncertainty, and instability imposed on federal forest management. These conditions reduce the ability of federal agencies to properly manage one of our nation's most important, valuable, and renewable resources.

Reduced forest vegetation management and productivity means reduced income to the private sector as well as the public sector. Reduced federal timber sales in the future will critically affect the timber industry. In some areas the federal government is the major forest land owner. Its land base available for growing commercial crops of timber is frequently reduced for a variety of purposes including wilderness, roadless areas, hunting, camp-

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[6]Bureau of Land Management, U.S. Department of the Interior, Vegetation Management With Herbicides Western Oregon - Final Environmental Statement 1978. To put these figures in perspective, in 1983 the Forest Service sold $774 million worth of timber, approximately 25% of which is distributed to the counties from which the timber was cut. "Report of the Forest Service - Fiscal Year 1983" U.S. Department of Agriculture, Forest Service, Washington, D.C., February 1984. Similarly, according to Hank Noldan, Director of Timber Management, Bureau of Land Management, BLM receipts from timber sales for fiscal year 1984 totaled more than $133 million, 50% of which is distributed to counties.

ing, and other uses. Thus, it is imperative that the remaining productive acreage be managed effectively. While the impacts of reduced forest productivity are not immediate, federal land managers will never be able to regain the lost growth potential. Reducing the productivity of the remaining land, on which the forest industry relies, will eventually create hardship in some areas. That hardship will include not only lost income, but lost jobs for those who harvest, transport, and manufacture forest products.

Oregon, for example, is a state heavily dependent on federal timber. In Oregon, where 78% of the timber is publicly owned, the forest industry directly employs 62,000 people. In 1983, the forest industry in Oregon produced lumber with an estimated wholesale value of over $1.7 billion.[7] Lost productivity on federal lands could in the future have a devastating effect on the forest industry in Oregon and the economy of that State.

Should the current halt in forest vegetation management extend for a number of growing seasons, the loss in productivity may create a sufficient reduction in supply to cause increased prices of forest products to consumers.

Amicus curiae NFPA stresses the impact of lost productivity on federal forest lands, but the Ninth Circuit decision has also caused other problems. Herbicides are customarily used on leased federal grazing lands to control noxious weeds which can harm cattle and sheep. This decision will reduce federal income because less grazing land will be suitable for lease or because land will be leased at a reduced rate due to reduced forage value. Similarly, the private sector will be affected by the lost availability of

[7]Western Wood Products Association Economic Services Department, 1983 Statistical Year Book of the Western Lumber Industry (1984).

grazing land which is already scarce in some areas. This decision may also affect herbicide use by the federal government for weed control along rights-of-way for road safety.

The Court of Appeals' Misinterpretation of When NEPA Requires a Worst Case Analysis Will Delay and Increase the Cost of a Wide Variety of Federal Actions

The court of appeals' decision on when NEPA requires a worst case analysis warrants review by this Court. The Council on Environmental Quality regulations (40 C.F.R. § 1502.22) require agencies to perform a worst case analysis when "the information relevant to adverse impacts [of a proposed project] is important to the decision and the means to obtain it are not known . . . ." See Petition for Writ of Certiorari at 6. The misapplication of the worst case analysis requirement has been the primary cause of the lost forest productivity discussed above. Worst case analyses have not only been broadly required in proposed federal herbicide projects in the Ninth Circuit, but have been required in proposed federal insecticide projects and timber sales. [8]

The delays and losses experienced in federal forest vegetation management are likely to be only the beginning for BLM, the Forest Service, and federal agencies in general. Many proposed federal projects will have to contend with worst case analyses under the court of appeals' requirement that federal agencies perform a worst case analysis whenever there is a mere difference of opinion in

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[8] See *Committee for Integrated Pest Management v. Block*, Civ. No. 82-0570 (D.N.M. Mar. 5, 1984), and *National Wildlife Federation v. United States Forest Service*, Civ. No. 82-1153-50 (D. Ore. Aug. 6, 1984), as amended on reconsideration.

the scientific community over adverse impacts of a proposed agency action. In the court of appeals' view, only a very small amount of scientific uncertainty is needed to trigger a worst case analysis. Without guidance from this Court, virtually every federal project will be at risk unless a worst case analysis is performed. Initial experience with worst case analyses indicates that this is a costly, time-consuming, and difficult requirement to meet. See *Save Our Ecosystems v. Clark, supra.* Requiring a worst case analysis in virtually all cases, rather than those in which it is needed, cannot be justified.

The Court of Appeals' Requirement that BLM Independently Assess the Safety of Herbicides Will Cost the Federal Government Millions of Dollars To Duplicate Work Already Done

The court of appeals has stated clearly that "BLM must assess independently the safety of the herbicides that it uses."[9] Notwithstanding the fact that a number of Ninth Circuit decisions have discussed the appropriate relationship between the FIFRA pesticide registration process and NEPA, there remains a strong need for this Court to settle the nagging and potentially costly question of how much work done by the Environmental Protection Agency must be duplicated by another agency in the NEPA process.[10]

The nature and extent of proper reliance on and use of EPA's pesticide registration information and risk analysis in the NEPA process is an important question with nation-

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[9]*Southern Oregon Citizens Against Toxic Sprays v. Clark,* 720 F.2d 1475, 1480. (9th Cir. Dec. 2, 1983).

[10]See *Oregon Environmental Council v. Kunzman,* 714 F.2d 901 (9th Cir. 1983); and *Citizens Against Toxic Sprays, Inc. v. Bergland,* 428 F. Supp. 908 (D. Ore. 1977).

wide impact. It deserves the attention of this Court, now, so that federal agencies can fulfill their statutory duties in an orderly and predictable fashion. Although federal agencies cannot meet their NEPA obligations by relying *exclusively* on the conclusions reached by other agencies,[11] it is clear that agencies cannot ignore the data and conclusions of another agency.[12] The requirement not to ignore the data of another agency should be particularly strong when, as here, that agency has been charged by Congress with primary responsibility for ascertaining that information. This Court needs to explain that BLM need not, indeed must not, assess herbicide safety independently from EPA.

It would be wasteful and senseless for federal agencies proposing to use pesticides to ignore the valuable data and expertise of EPA. "Data contained in a typical registration package for a single new pesticide represent an investment of $20 to $25 million and eight to ten years of laboratory, field and environmental testing."[13] Even if it were possible for BLM to maintain a staff with the necessary expertise, it would be very expensive and time consuming to require BLM to duplicate these studies in the NEPA process.

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[11]See *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971); *Citizens Against Toxic Sprays, Inc. v. Bergland, supra;* and *Oregon Environmental Council v. Kunzman, supra.*

[12]*Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

[13]Federal Insecticide, Fungicide, and Rodenticide Act: Hearings on H.R. 5203 Before the Subcomm. on Department Operations, Research and Foreign Agriculture of the House Comm. on Agriculture, 97th Cong., 2d Sess. 39 (1982) (statement of Dr. Jack D. Early, President, National Agricultural Chemicals Association).

CONCLUSION

The petition for a writ of certiorari should be granted.

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October 1984

No. 84-267

In the Supreme Court of the United States

October Term, 1984

WILLIAM P. CLARK, ET AL.,
Petitioners,

vs.

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE MONSANTO COMPANY IN SUPPORT OF THE PETITION OF WILLIAM P. CLARK, ET AL., FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals, *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark,* is reported at 720 F.2d 1475. The opinion of the district court, *Southern Oregon Citizens Against Toxic Sprays v. Watt,* is unreported. (See Petitioners' Appendix, 13a-24a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1983. A petition for rehearing was denied on March 21, 1984. On June 8, 1984, Justice Rehnquist extended the time for filing a petition for writ of certiorari to and including August 1, 1984. On July 24, 1984, Justice

Rehnquist further extended the time for filing a petition for writ of certiorari to and including August 18, 1984. On or before August 18, 1984 petitioners William P. Clark, et al., filed their petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Respondent sought and was granted an extension of time to and including October 22, 1984 for filing its opposition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Letters from counsel for petitioners and respondent granting consent to the filing of this Brief have been filed with the Clerk of the Court.

STATUTES INVOLVED

Section 102 of the National Environmental Policy Act of 1969, ("NEPA") 42 U.S.C. (& Supp. V) 4321, and relevant provisions of the Federal Insecticide, Fungicide and Rodenticide Act, ("FIFRA") 7 U.S.C. 136 et seq., are reprinted at 27a-33a of Petitioners' Appendix.

INTEREST OF AMICUS CURIAE

Monsanto Company is a developer, manufacturer, and marketer of pesticides[1] including Roundup,* one of the herbicides the Bureau of Land Management ("BLM") proposed to utilize for its vegetation control spraying program. The decision of the Court of Appeals prevented BLM from purchasing and using Monsanto's product pending preparation of the court-ordered NEPA review. No pesticide may be marketed unless it has been registered by the Environmental Protection Agency ("EPA") after extensive testing pursuant to FIFRA. Although Congress has charged EPA with the duty of providing pesticides will

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1. As used in FIFRA and in this Brief, the term "pesticides" includes herbicides as well as a variety of other products such as insecticides and fungicides.

*A registered trademark of Monsanto Company.

not cause unreasonable adverse effects on the environment, the Court of Appeals ruled BLM and any other federal agency using pesticides cannot rely on EPA but must instead independently conduct a scientific analysis of each pesticide the agency proposes to use. This court-ordered analysis will take place totally outside the carefully constructed congressional scheme embodied in FIFRA. Pesticide producers which sell their products to federal agencies will be subjected to still further layers of federal regulations as each federal agency devises its own testing and research requirements under NEPA. Data submitted to agencies other than EPA will not carry with it the protections, both procedural and substantive, that FIFRA demands and which this Court considered the past Term. See *Ruckelshaus v. Monsanto Company*, ... U.S. ....., 104 S.Ct. 2862 (1984).

Because of Monsanto's concern about the debilitating and contradictory effects of such a duplicative regulatory system, the Company participated in this case as amicus curiae in the Court of Appeals. This Brief addresses the opinion below from the viewpoint of pesticide manufacturers already subject to the comprehensive regulatory scheme of FIFRA.

REASONS FOR GRANTING THE WRIT

1. The tasks assigned to BLM by the Court of Appeals duplicate EPA's responsibilities under FIFRA. FIFRA's comprehensive scheme includes an extensive data review process which EPA undertakes as part of its decision to register a pesticide or to cancel or suspend an existing registration. See, e.g., *Ruckelshaus v. Monsanto Company*, ... U.S. ....., 104 S.Ct. 2862, 2866-70 (1984). All of the products BLM sought to use in its forest spraying program are currently registered by EPA, pursuant to FIFRA, for those very uses. According to the Court of Appeals, BLM cannot rely on EPA's determinations regarding these pesticides. NEPA, the Court ruled, requires each federal agency to conduct an independent scientific evaluation of the potential harmful effects of each pesticide it seeks to use whenever any question is raised about the product's safety. The Court of Appeals did not find defects in EPA's implementation of FIFRA. Instead, it determined as a procedural matter that one agency cannot rely upon the decisions of another in carrying out its NEPA responsibilities. The implications of that determination are far-reaching.

a. Notwithstanding the substantial data required of registrants, and EPA's thorough analysis of that information preceding FIFRA registration, pesticide manufacturers now face entirely new review processes, processes with no data guidelines, standards or consistency in approach. The research and test data now required by EPA to support registration under FIFRA is extensive and costly. EPA's data requirements published in proposed form on November 24, 1982 (47 Fed. Reg. 53192 et seq.) reflect the broad range of complex studies EPA requires of registrants.

These include efficacy technical information, phytotoxicity studies, metabolism and residue studies, environmental chemistry studies, toxicology studies, fish and wildlife studies and manufacturing studies. A single long-term animal feeding study to assess chronic toxicity can itself cost several hundred thousand dollars and can take 4 years. These research and test data, and the trade secrets contained in them, must be furnished to EPA to register a product under FIFRA. *Ruckelshaus v. Monsanto Company, supra,* 104 S.Ct. at 2870-71. Under the Court of Appeals' decision, as subsequently explained in *Merrell v. Block,* No. 83-3908, slip op. 10-11, 14 (9th Cir. Jan. 27, 1984), all federal agencies using pesticides must now analyze this complex data package by undertaking research activities themselves or by requiring registrants which have satisfied EPA to develop even more data.

FIFRA establishes EPA as the "congressionally designated expert on pesticides." *United States v. Goodman,* 486 F.2d 847, 849 (7th Cir. 1973). It is incongruous, and inconsistent with the rule of reason governing NEPA's procedural requirements, for the Court of Appeals to conclude that after enacting FIFRA Congress intended other federal agencies, regardless of their lack of expertise, to stand in EPA's stead. This result threatens pesticide producers with the extraordinary burden of conducting years of additional research and testing whenever a federal agency needs to compile an environmental impact statement ("EIS") before using their product. See *Metropolitan Edison Company v. PANE,* 460 U.S. 766, 776 (1983).[2]

b. Respondent has ignored FIFRA and the decision below encourages it to do so. If any individual

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2. Federal agencies may find it difficult to obtain suppliers for their pesticide needs when these are the consequences.

believes there is a human health risk associated with the use of a pesticide, they may formally request, pursuant to the provisions of FIFRA, that EPA revise or cancel the registration; if the Administrator refuses to do so, they may obtain judicial review. 7 U.S.C. 136n(a). Instead of utilizing the procedures established by Congress, respondent sought to delay use of these products through the creation of a new NEPA-based review process conducted by federal agencies which use the products. Any concerns respondent has about a particular pesticide can and should be addressed to EPA pursuant to FIFRA.

The decision below also deprives registrants such as Monsanto of their rights under FIFRA. Section 6(b) of FIFRA, 7 U.S.C. 136d(b), and EPA's registration regulations in 40 C.F.R. 162.11, ensure that issues regarding the safety of the product are thoroughly considered before a registration is cancelled. Under the NEPA program devised by the Court of Appeals there are no procedural safeguards and thus no assurances that an agency's decision to preclude use of an EPA-registered product was based on a full, accurate understanding of the data. Furthermore, the provisions in FIFRA carefully regulating the use and disclosure of registrants' trade secret data, which Congress developed to protect the interests of registrants within the overall goals of FIFRA, would no longer be applicable.

c. Virtually any pesticide use by a federal agency can be enjoined because no agency other than EPA has conducted the broad-ranging, complex scientific analysis involved in registration of a pesticide. The Court of Appeals' decision has produced precisely that result. Government spraying programs have been enjoined in BLM's Eugene Oregon District, in the Siuslaw National Forest, and in the remainder of the BLM and U.S. Forest Service

areas in Oregon and Washington, as well as portions of Idaho and Northern California. See *Merrell v. Block,* No. 83-3908, slip op. (9th Cir. Jan. 27, 1984); *Save Our Ecosystems v. Watt,* No. 83-3908, slip op. (9th Cir. Jan. 27, 1984); *Northwest Coalition for Alternatives to Pesticides v. Block,* Civ. No. 82-6272, slip op. (D. Or. Jan. 6, 1984), *appeal pending,* No. 84-3821 (9th Cir.). In light of the Court of Appeals' interpretation of NEPA, the spraying of thousands of acres of federal lands will come to a halt, with serious potential adverse impact on timber production, while a redundant scientific review of the pesticides is conducted, possibly taking many years.

d. The principle that NEPA can prevent an agency from utilizing another agency's decision made in accordance with a congressionally-mandated review would not be limited to pesticides. Disagreements over the safety of drugs often accompany Food and Drug Administration ("FDA") implementation of the Food, Drug and Cosmetic Act, 21 U.S.C. 301 et seq. For example, opponents of use of a particular drug could require that the Veterans Administration or a military installation conduct an independent review of the safety of that drug before allowing it to be used, notwithstanding FDA registration. Products reviewed by other agencies, such as the Consumer Product Safety Commission or the National Highway Traffic Safety Administration, could similarly be subject to duplicate analysis by federal users. Even EPA's establishment of health-based restrictions on emissions from motor vehicles or additives to fuel, pursuant to the Clean Air Act, 42 U.S.C. 7401 et seq., would not be controlling on other government agencies which purchase those products. Such a circumvention of congressional-mandated duties, and a duplication of expertise among agencies, was never contemplated by Congress, or sanc-

tioned by previous courts, as part of the review obligations imposed by NEPA.[3]

2. The problems presented by the Court of Appeals' decision are particularly acute due to the Court's additional misapplication of NEPA in requiring BLM to examine mere possibilities, however remote, of an adverse health effect. The district court found that any "potential harmful effect on human health" must be considered a significant adverse effect requiring further review by the agency, including a "worst case" analysis. *Southern Oregon Citizens Against Toxic Sprays v. Watt*, No. 79-1098FR, slip op. 8 (D. Or. Sept. 9, 1982). The Court of Appeals agreed that the "uncertainty" about the "possibility" of significant adverse effects requires a worst case analysis. *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983).[4]

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3. In directing BLM to ignore EPA's determinations under FIFRA, the Court of Appeals misapplied earlier court decisions which caution that an agency may not *abdicate* its responsibilities under NEPA on the basis of decisions made by other agencies. See, e.g., *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F.Supp. 908 (D. Or. 1977) and *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). Those cases merely hold that an agency may not let another agency's decision relieve it of the responsibility to apply NEPA's deliberative process and determine its own course of conduct. This does not mean, however, that the agency may not consider - and rely upon - the conclusions of the other agency. The agency subject to NEPA still must make its own determination whether and how to proceed, weighing its proposed action against the foreseeable environmental effects associated with that action. For example, BLM might decide not to use a particular pesticide, even though it is registered by EPA, because of particular site factors or because EPA may have pending possible changes to the registration. EPA's determination regarding the registerability of these pesticides, however, is one of the factors available to BLM in assessing its actions, and BLM must be allowed to rely upon that determination.

4. The regulations of the Council on Environmental Quality ("CEQ") do not require worst case analyses to examine every possible uncertainty about an action. They specifically provide

(Continued on following page)

Uncertainty about ultimate effects can accompany virtually any federal action; such a criterion for review dramatically increases the number of situations where an EIS can be ordered and greatly expands the research which must be conducted. No amount of empirical data can ever provide 100% assurance that any substance is totally "safe." Thus, by insisting that the only way to avoid independent review or worst case analysis is to prove a negative, the Court of Appeals has ensured there will always be "potential" for harm and "uncertainty" which can be used to compel federal agencies to comply with the new substantive obligations which the Court of Appeals has created.[5]

By requiring federal agencies to undertake such an intensive analysis of speculative risks associated with product safety, the Court of Appeals has burdened federal agencies and has legislated a new layer of regulatory requirements on manufacturers of products such as pesticides and drugs used by those agencies. The research obligation imposed on these agencies by the Court of Ap-

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Footnote continued—

that the worst case analysis is required only when an agency is evaluating significant adverse effects on the human environment in an EIS. 40 C.F.R. 1502.22. "Uncertainty" about the "potential" of human health effects cannot meet the threshold test of "effect" as defined in the CEQ regulations because it cannot be reasonably foreseeable, so the worst case regulation does not come into play. Only when a foreseeable effect exists would a worst case analysis be relevant to ensure data gaps or scientific uncertainty do not leave review of that effect uncompleted. The Court of Appeals has improperly interpreted this limited intent of the worst case regulation to create a procedure for requiring review of speculative events which do not meet the definition of "effect."

5. Even though respondent presented information raising uncertainty about potential health effects of only one (2,4-D) of the 13 herbicides under consideration by BLM, the district court enjoined the spraying of all herbicides pending their review in a worst case analysis.

peals directs them to develop data to *resolve* the uncertainties, not merely to identify the information which has been developed on a particular product and reveal the scientific disagreements so that the decision-maker may consider this information, which is all that NEPA requires. See *Conservation Council of North Carolina v. Froehlke*, 435 F.Supp. 775, 793 (M.D. N.C. 1977).

To avoid such an unbounded expansion of NEPA, it has been consistently held that federal agencies should limit their inquiry to probable effects, avoiding unproductive examinations of remote or highly speculative events. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980). The Council on Environmental Quality ("CEQ") codified this essential limitation by defining the unreasonable adverse "effects" which an agency must examine in an EIS as those consequences which will directly occur or which are "reasonably forseeable." 40 C.F.R. 1508.8. If there is uncertainty about even the possibility of an event, such a possibility cannot be an "effect" which federal agencies must examine. Disregarding this fundamental principle of NEPA led the Court of Appeals into a direct confrontation with FIFRA's congressional scheme, which specifically addresses such issues. In complying with NEPA, federal agencies should build on FIFRA, not be charged with recreating it. "Time and resources are simply too limited . . . to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it." *Metropolitan Edison Company v. PANE, supra*, 460 U.S. at 776.

CONCLUSION

For the reasons set forth above, this Court should grant the Solicitor General's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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V.

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RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICUS OREGONIANS FOR FOOD & SHELTER, INC.

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Respondents

Petition for Writ of Certiorari to the

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The Ninth Circuit

Brief of Amicus Curiae

Oregonians for Food & Shelter, Inc.

In Support of Petitioners

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Oregonians for Food & Shelter Inc., (OFS) respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

Oregonians for Food & Shelter, Inc. ("OFS") is a non-profit, tax-exempt corporation, organized and existing under the laws of Oregon for the purpose of pursuing the public interest involved in the appropriate use of pesticides. To that end OFS has undertaken programs of study and publicity designed to aid the general public in understanding the vital,

essential role played by pesticide use in maintaining our forest, farm and agricultural economies, with particular emphasis on the Northwest. OFS has over 2,000 members drawn from a diverse cross-section of the farm, forestry, medical, small business and domestic user sectors of Oregon society.

OFS is particularly concerned as a public interest organization about the practical effects of the Ninth Circuit's decision to impose a worst case analysis requirement on Bureau of Land Management's ("BLM") use of pesticides. In this regard it is essential for the Court to be aware of the relationship that exists between federal programs for weed control and food and fiber production and those implemented by the private sector. The

Ninth Circuit's decision will not be isolated in its ramifications to the research and fiscal burden it unnecessarily imposes on BLM. The most onerous burden will fall on the tri-partite cooperative herbicide programs conducted by the private sector with local and state governments and individual federal agencies. In addition, the yield of biddable timber available to the private sector from BLM managed forest lands will decrease as a result of the cessation of herbicide use. Furthermore, the inability of BLM to pursue its timber management programs, in which the use of herbicides is central, will have direct affects on surrounding farm and privately held timber lands, increasing the burden of weed control on lands adjacent to federal property. If

BLM is forbidden to use herbicides until all information gaps are filled and all scientific uncertainty removed, a task which it is beyond known methodology to fulfill completely, it will only be a short step to imposition of a similar requirement on all pesticide use. Indeed a law suit with just that end in mind has already commenced in the United States District Court for the District of Oregon, (Eugene), (Paul E. Merrell v. William D. Ruckelshaus et. al., No. 84-6185-E).

For the foregoing reasons it is essential that the Court be aware of the importance of the contribution which herbicide use makes both to the forestry and to the farm economies in Oregon. It is at this level that the Ninth Circuit's decision in this case will ultimately be

felt. A brief thumbnail sketch derived from the expert testimony submitted in NCAP v. Block, et.al, Civ. No. 82-6272 (D. Or. Jan 6, 1984), appeal pending, No. 84-3821 (Ninth Circuit), (hereinafter "NCAP"), reveals the dilemma in which the Ninth Circuit's decision in SOCATS v. Clark 720 F.2d 1475 (9th Cir. 1983) has placed the forest products and agricultural industries in Oregon.

The Contribution To Forestry Production of Pesticide Use in Oregon.

According to the testimony given by Dr. Douglas J. Brodie in NCAP, the cessation of herbicide use on both private and public forest lands in Western Oregon alone would entail a loss of $291,000,000 annually, (p. 4, Statement of Dr. Douglas Brodie, NCAP v. Block, D. Or., Civil No.

83-6273-E, hereinafter "Brodie").

The further implications of this loss were drawn out by Dr. Brodie when he stated that,

> . . . the total direct employment loss from the decrease in harvest volume (of timber) due to the inability to apply herbicides amounts to 13,095 jobs when sustained yield is achieved. In addition to that number, additional jobs are lost in the service sector: conservative estimates indicated that for every job in the forest products industry lost, an additional 1.5 jobs are lost in the service sector (yielding unemployment multiples of 2.5) . . . Totalling entire job loss, one multiplies the 13,095 direct jobs by 2.5 to obtain a total job loss of 32,737. (Brodie at 5.)

Very little of this loss will be felt immediately due to the nature of timber growing and harvesting. According to Dr. Brodie, this is due to the fact that ". . . the current low volume of

timber in existing stands and the fact that herbicide treatments are applied to stands that won't be thinned for three decades or final harvest for six decades", accounts for the lag in impact. (Brodie at 5.)

Dr. Brodie concluded his testimony with the observation that,

> Scarcity of available timber or harvest is the prospect for the private entrepreneur seeking raw material supplies for the timber industry on either public or private lands over the next several decades . . . A ban on a productive agent such as chemical herbicides will intensify the long-term scarcity problem on both public and private lands and compound the problems of private purchasers and processors.

The affects on agricultural operations are no less dramatic than those that will follow a severe restriction on the use of herbicides in forestry production. It is

to the specific affects of the Ninth Circuit's decision and its implications for agriculture that attention is now directed.

The Affect of Public Land Management on Private Agriculture in The Northwest.

When considering the NCAP testimony of Dr. Arnold Paulsen, the relationship between public land management and private agriculture is most clearly brought to the fore. Dr. ~~Brodie~~ PAULSEN stated that,

> [i]f Federal agencies do not control weeds, infestation of adjacent private lands via wind, water and animals will be quick and complete. Incentive to control weeds on private range will be small if Federal agencies are enjoined by court order from controlling weeds. Federal lands are usually located at higher elevations and wind and water scatter weed seeds on

> private lands. (p.3, testimony of Dr. Arnold Paulsen in NCAP v. Block, D.Or Civ No. 83-6273-E, hereinafter Paulsen.)

Dr. Paulsen was also very clear on the nature of the specific problems facing Oregon's farmers and the beneficial affects herbicides have in treating these recurring problems. He stated that,

> Grass, forage, range and hay are the products of 20-30 million acres in Oregon and Washington. Weeds, brush and juniper regularly invade these areas and reduce the animal grazing capacity of the land. Herbicides are needed to maintain and increase the volume of feed. Weeds also reduce the quality of forage and the value of pasture and the price of private land. (Paulsen at 2)
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> . . . Federal agencies should not be allowed to withdraw from area wide herbicide control of weeds but should rather be required to fully participate in all area wide efforts to control range weeds. Herbicides are the most effective and lowest cost

method of range weed control. (Paulsen at 3).

The partnership between private agriculture and the federal government will come to a virtual halt if in every case where an agency wished to use a herbicide (which is already registered by the EPA), it had first to produce a worst case analysis for that herbicide as not having an unreasonable adverse affect on the environment. The concerns of OFS are fuelled by the seeming abdication of the Ninth Circuit from any consideration of the practical affects its decision to demand a worst case analysis will have on the forestry and agricultural sectors of the Oregon economy. The lack of reflection on the real world affects of their decision, seemingly made in the

abstract, draws attention to the ethereal nature of the Court's analysis. It is the intention of amicus in this case to present to this Court an alternative view of the Council on Environmental Quality Regulations at issue, a view that implements the policy of those regulations, as well as fulfilling the Congressional mandate set forth in the National Environmental Policy Act, (42 U.S.C., Sec. 4321-4361) (hereinafter "NEPA") and the Federal Insecticide Fungicide and Rodenticide Act (7 U.S.C., Sec. 136-136y) (hereinafter "FIFRA").

SUMMARY OF ARGUMENT

The Ninth Circuit erred in failing to articulate risk criteria for determining when a worst case analysis would provide relevant information to a decision-maker

engaged in a herbicide use decision under NEPA.

ARGUMENT

The Council on Environmental Quality Regulations and the Worst Case Analysis.

The fundamental concept of central signficance in this case is that of "relevance". It is this idea that links the Council on Environmental Quality's ("CEQ") interpretation of NEPA, in its Regulations, to the Congressional mandate contained within the registration requirements for pesticides in the much amended Federal Insecticide, Fungicide and Rodenticide Act.

The CEQ Regulations at issue in this case are to be found in 40 CFR 1502.22(a)-(b). Those regulations contain the requirements for the so-called worst case analysis procedure which is to be used in certain

environmental impact statements in order to satisfy NEPA. Not all environmental impact statements are required, or even expected, to contain a worst case analysis. The triggering mechanism is whether the information is "necessary" to the reasoned and informed decision-making demanded by NEPA.

In pertinent part the regulations require that,

> When an agency is evaluating signficant adverse affects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.
> (a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

> (b) If (1) the information relevant to adverse impacts is essential to the reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant or (2) the information is relevant to adverse impacts, is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence. 40 C.F.R. 1502.22(a)-(b). (emphasis added)

The primary issue to be addressed in applying CEQ's worst case analysis requirement is that of the relevance of the information to the decision. Even where, as in this case, the dispute is about the existence of scientific uncertainty, the matter resolves itself into a debate on

relevance. As there will always be some gap in information, because one can never have perfect information (See, generally, The Study of Policy Formation, (R.A. Bauer and K.J. Gorgen, eds., 1968); G. Calabresi and P. Bobbit, Tragic Choices, (1978)) the question will be: Is the gap in information, which gives rise to the uncertainty in the scientific community, relevant to the decision, or is it simply a lament directed at the, as yet unachieved, perfectability of human knowledge? To some extent that could be a very subjective determination but within environmental law that decision is bounded, especially where herbicides are concerned, by the general legal framework erected by the NEPA requirements and the specific dictates of FIFRA.

Consideration of Relevant Consequences Under NEPA

The Case Law

The CEQ Regulations setting forth the need for consideration of the consequences of the proposed action codifies the prior law, (Sierra Club v. Sigler, 695 F.2d 957, 971 (5th Cir. 1983)). That law erected a rule of reason by which to judge an agency's consideration of the consequences to the environment of its proposed action. According to the Sierra Club v. Sigler, Court, supra at 971,

> The CEQ's worst case analysis regulation merely codifies these judicially created principles. The CEQ has declared, in accord with the requirement of Scientists Institute, that "the purposes of the analysis is to carry out NEPA's mandate for full disclosure to the public of the potential consequences of agency decisions, and to cause agencies to consider these potential con-

> sequences when acting on the basis of scientific uncertainties for gaps in available information." Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,-032 (1981) (Answer to Question 20b).

The existence of uncertainty or gaps in information is not in itself sufficient to trigger the need for a worst case analysis. Given the finite nature of knowledge, there will always be less than complete information available on the totality of our world. On a down to earth, practical level, the level at which the government is intended to operate, it is necessary to decide which uncertainties or gaps in information are relevant. It is simply not sufficient, either in law or in practice, to identify an uncertainty or a gap in information without going one step further and announcing a criteria of

relevance which would allow one to identify relevant gaps in information and relevant uncertainties. Otherwise NEPA statements would become little more than preludes to science fiction of an impractical nature; a barrier to action rather than a guide to implementation of vitally necessary government undertakings.

It was to this very point that the Court in Trout Unlimited v. Morton 509 F.2d 1276, 1283 (9th Cir. 1974), was addressing itself when it stated that,

> Appellants urge that the EIS is inadequate because it fails to discuss many possible environmental consequences. Many of these consequences while possible are improbable. An environmental impact statement need not discuss remote and highly speculative consequences. EDF v. Corps. of Engineers, 348 F. Supp. 916, 933 (N.D. Miss. 1972) aff'd, 492 1123 (5th Cir. 1974). This is

> consistent with the (CEQ) Council on Environmental Quality Guidelines and the frequently expressed view that adequacy of the content of the environmental impact statement should be determined through use of a rule of reason. Lathan v. Brinegar, supra; EDF v. Corps. of Engineers, 492 F.2d 1123 (5th Cir. 1972); Life of the Land v. Brinegar, supra; National Resource Defense Council v. Morton, 458 F.2d 827 (DC. Cir. 1972). A reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an environmental impact statement.

The Ninth Circuit has in the past agreed with this general approach. In Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980) the court stated that,

> The Task Force complains that the environmental impact statement contains no discussion of the consequences of total failure of the dam in the wake of a catastrophic seismic event. We hold that such discussion is

> unnecessary. An impact statement must be particularly thorough when the environmental consequences of federal action are great. See Iowa Citizens for Environmental Quality, Inc . v. Volpe, 487 F.2d 849, 852 (8th Cir. 1973). However, an impact statement need not discuss remote and highly speculative consequences. Trout Unlimited v. Morton, 509 F.2d 1275, 1283 (9th Cir. 1974).

Even if it were possible to remove all uncertainty about the consequences of a particular governmental action and to fill all information gaps prior to commencement of a particular project which had admitted environmental consequences, it is far from clear that such would be necessary under the dictates of NEPA as interpreted by the United States Supreme Court. The Court, in its recent decision in Metropolitan Edison Company v. PANE, 51 USLW 4371, 4374, pointed out that,

> Time and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978). The scope of the agency's inquiries must remain manageable if NEPA's goal of "ensuring a fully informed and well considered decision" id, at 558, is to be accomplished . . . NEPA does not require agencies to evaluate the effects of risk, qua risks.

Likewise, NEPA does not expect an agency to resolve uncertainty or fill an information gap simply because they exist. The reason for doing so must be that it is relevant to the decision, the major federal action for which the environmental impact statement is being prepared. Only relevant uncertainties and relevant information gaps need be addressed in the environmental impact statement.

In general, the test for relevancy will depend on a number of factors including the type of project contemplated, the nature of the risks that are uncertain, the probable importance of any perceived information gaps and the value of the missing information to the project at hand.

In the instant case, which concerns the use of certain herbicides, however, it is unnecessary, and probably undesireable, to rely upon general criteria of relevance. Congress has very clearly articulated the criteria of relevance in this field. Congress has had the opportunity over the last 40 odd years to address itself to the very question under consideration here: At what point do possible risks to people and their environment, through the

use of herbicides, rise to the level of relevance such that it is necessary for the government agency, whose sole responsibility is as caretaker of the environment, to address them?

In enacting and amending the Federal Insecticide, Fungicide and Rodenticide Act, (FIFRA) (1947) Congress has directly and repeatedly considered the environmental affects of herbicide use. Congress has also considered the role that the EPA should play in protecting human kind and the environment from risks that might arise from the use of herbicides. In addition, Congress has laid down a very clear test of relevance for such risks and their investigation.

FIFRA and the Environment.

FIFRA was enacted in 1947 and it has since been amended on several occassions. In 1970 Congress made EPA the sole agency responsible for registering herbicides, Pub. L. No. 92-516, October 21, 1972. The major Congressional focus in the 1972 amendments was on the environment and the affect on the environment of herbicide use. For this reason Congress made protection of the environment an explicit and dominant criterion in the registration process for all pesticides. In the definition sections of the Act, Congress very carefully provided that,

S.2. Definitions.

. . .

(x) Protect Health and the Environment. The terms 'protect health and the environment' and 'protection of health and the environment' mean protection against any unreasonable adverse affects on the environment.

In turn the term "unreasonable adverse effects on the environment" is itself defined as,

(bb) Unreasonable Adverse Effects on the Environment.

"The term 'unreasonable adverse effects on the environment' means any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide.

EPA was commanded under the Act to register a pesticide for use only if the pesticide warranted the claims made for it, its labeling complies with the Act,

and it would not generally have any unreasonable adverse effects on the environment, 7 U.S.C., S. 136a (c)(5) (Supp. III 1979. See also, (1972) U.S. Code Cong. and Ad. News 4117). A FIFRA registration of an herbicide is therefore equivalent to an EPA decision that the herbicide will not have an adverse impact on the environment if used in accordance with its label instructions and in accordance with widespread and commonly recognized practice.

That this is so is borne out by the legislative history of the Act. In the Section-by-Section analysis of the Act, the legislative history notes that,

> Subparagraph (B) specifies that a general use pesticide is one which the Administrator has determined will not cause unreasonable adverse effects on the environment when applied in accordance with its directions for use and warning or caution statement, or in accordance with a commonly recognized practice. ((1972) U.S. Code Cong. and Ad. News 4118).

By the time that Congress came to amend FIFRA in 1978 serious problems in its administration had arisen. According to the House Report on the 1978 amendments,

> The registration and reregistration process, which is the foundation of the program, has come to a virtual halt. This had impacted seriously on the availability of pesticides in the production of crops and has affected the ability of pesticide formulators both large and small to continue in the business; it has frustrated the public and the Congress. Even the Agency (the EPA) has admitted serious problems are occurring in the administration of the program and has requested legis-

> lative relief. This has not been the fault of any one factor. ((1978) U.S. Code Cong. and Ad. News 1991).

If the Ninth Circuit's view of NEPA were to prevail, it would re-instate the very same problem that the Congress attempted to alleviate in its 1978 amendments to FIFRA. The use of herbicides, passed upon by EPA as not presenting an unreasonable adverse threat to the environment, would come to a halt, at least insofar as Federal agencies are concerned. Private users of herbicides would continue to use the same herbicides forbidden to the agencies. All of the herbicides used by private entities and individuals have been approved by EPA under the Congressionally mandated environmental standard. Yet, the Federal agencies, such as BLM, would be precluded from using EPA approved

herbicides in performing their legislatively mandated tasks.

In order to deal with the problem of pesticide registration under the 1972 version of FIFRA, Congress adopted a number of amendments. The amendments to the Act were intended to alter the administrative method of registration approval. The alterations in the structure of FIFRA evidence a continuing concern for the environment. For instance, in permitting "conditional" registrations under certain circumstances by relaxing the need for proof of efficacy, the Congress steadfastly insisted that the full environmental standard continue to apply. While seeking administrative effectiveness the Congress refused to sacrifice its primary concern with the environment and the need to

guard it against degradation. According to the House Report,

> Conditional registration would be allowed for a pesticide identical or substantially similar to a currently registered pesticide and for a new use of an already registered pesticide only if, in each case, it would not significantly increase the risk of unreasonable adverse effects on the environment. . . A third type of conditional registration would apply to a pesticide containing new active ingredients but only if it would not cause any unreasonable adverse effect on the environment during the period of conditional registration. (emphasis added) ((1972) U.S. Code Cong. and Ad. News 1992,3).

A "conditional" registration has to meet the full environmental standard for ordinary registrations under FIFRA. The only "conditional" aspect to these registrations sanctioned by Congress under the 1978 amendments is the issue of efficacy

themselves. It is a Congressional decision to allow users to assess the efficacy. However, environmentally, the full rigor of the Act still applies.

Another area of Congressional focus in 1978 concerned the administrative process by which registrations were to be cancelled or suspended under the 1972 version of FIFRA. In 1977, EPA had introduced what is known as the Rebuttable Presumption Against Registration (RPAR) whenever it sought to gather evidence prior to its decision to cancel or suspend the registration of a herbicide previously approved by it. As the House Report explained,

> Several of the witnesses discussed at length the criteria used by the Agency to trigger a Notice of Rebuttable Presumption Against Registration (RPAR). Under this administrative procedure established by the Agency, suspect chemicals are reviewed, and when the Agency determines that there is some evidence to indicate the possibility of either environmental or health hazard, an RPAR, or public notice, is issued seeking information from manufacturer, users and other interested parties to rebut the presumption of risk based on the cited evidence and to submit information about benefits derived from the use of pesticides. Some of the witnesses expressed concern over the validity of the risk criteria used and indicated some concern over the effect of such a notice on the market appeal of the pesticide. (emphasis added) ([1978] U.S. Code Cong. and Ad. News 2050).

The Congress was very consciously addressing its mind to the problem of risk assessment and the affect of herbicides on the environment. That is

not a dissimilar question to that before the Court in this present petition. Congress was aware that, "[h]uman exposure to pesticides through any medium or pathway is a central issue in evaluating the unreasonably adverse effects of pesticide products" (supra at 2052.) However, Congress was also aware that our laws must be fixed on reality, not simply on our fears, no matter how well grounded those fears may appear in the abstract. For that reason, Congress added Sec. 3(c)(8), 7 U.S.C., Sec. 136a(c)(8) (Supp. III 1979), to the 1978 version of FIFRA in order that EPA predicate any interim administrative review of a pesticide only upon "a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or to

the environment", (See (1978) U.S. Code Cong. and Ad. News 2051).

The House Report is very clear in its condemnation of EPA proceeding on the basis of mere fears and surmise. To trigger in-depth analysis of the environment and the consequences of herbicide use, Congress demanded more than mere conjecture on allegation of risk.

The House Report states that,

> The Administrator shall insure that pesticides shall be subject to the RPAR process only on the basis of a validated test or other significant evidence (and not on the basis of unsubstantiated claims), that the term "validated test" be defined as a test conducted and evaluated in a manner consistent with accepted scientific procedures, and that the term "other significant evidence" be defined as evidence that relates to the uses of a pesticide and their adverse risk to man or to the environment. It is the intent

> of the conferees that "other signficant evidence" of adverse risk means factually significant information and is not to include evidence based only on misuse of the pesticide. (emphasis added) ((1978) U.S. Code Cong. and Ad. News 2051).

Congress very clearly laid down its own test for what is a relevant risk or a relevant information gap associated with the use of an herbicide and its possible affect on the environment. The test of relevance is that a purported risk rises to the level of relevance only when it is based on "a validated test or other significant evidence raising prudent concerns of unreasonable risk to man or to the environment", supra at 2051. The legislative history of the 1978 FIFRA amendments is all the more compelling when it is remembered that in enacting

those amendments Congress was addressing itself simultaneously to concerns of the environment, the use of herbicides, and the task of erecting a useful, relevant test for risk assessment to be used in EPA evaluation of herbicide use impact on the environment. Those trilogy of concerns repeat themselves in this case. It is this same three-part problem on which the Ninth Circuit delivered its SOCATS v. Clark, 720 F.2d 1475 (9th Cir. 1978), (hereinafter "SOCATS") decision.

The Ninth Circuit Decision in SOCATS v. Clark: A failure to understand the nature of decision-making.

In interpreting the CEQ's regulations on the need for a worst case analysis the Ninth Circuit in SOCATS, supra, purported to be applying

what it termed "a common sense interpretation", of the C.E.Q. NEPA Regulations, 40 C.F.R. 1502.22, SOCATS supra at 1479. The District Court had found there to be "scientific uncertainty" as to the environmental and human health impacts of the use of herbicides SOCATS supra at 1477. From the simple existence of "scientific uncertainty" the Court of Appeals concluded that a worst case analysis had to be conducted, SOCATS, supra at 1481. However, as is pointed out above, a worst case analysis is required under the CEQ Regulations only when the information is "relevant to adverse impacts". Yet the Court's decision would also cut BLM off from reliance on the fact of EPA registrations of the herbicide. because the Court stated that, "[t]he BLM must

assess independently the safety of the herbicides that it uses" and may not depend on the EPA registration of the same herbicide under FIFRA.

The Ninth Circuit Court of Appeal's decision contains limited analysis and tends to give way to an almost irresistible urge on its part to assert what the law should be, rather than searching for what the law is. The Court appears to be unaware that scientific uncertainty, at some level, will always exist. The most extensive worst case analysis will not remove all scientific uncertainty or all information gaps, no matter how extensive the commitment of public resources involved. The question is not whether scientific uncertainty exists but whether relevant information is missing and

whether there is uncertainty over relevant risks that need to be addressed in the EIS prior to federal action. The Ninth Circuit's decision is bereft of any attempt to provide a guiding rudder to BLM as to which risks are relevant risks that must be investigated. By failing to announce criteria of relevance to be applied in implementing the CEQ's worst case analysis the Court has set for BLM an impossible task, that of removing all uncertainty, of filling all information gaps. Had the Court addressed itself, as the Congress did in amending FIFRA in 1978, to the real life problems of herbicide use and protecting the environment from adverse affects, it would have seen the need for fashioning a triggering mechanism on the basis of which it would be possible to

identify relevant risks. The construction of a test for risk relevancy is the very task Congress set itself in 1978. At that time Congress decided that the relevant test for risk to the environment through herbicide use should be based on "a validated test or other significant evidence raising prudent concerns of unreasonable risk to man or the environment" ((1978) U.S. Code Cong. and Ad. News 2051).

The test which Congress laid down for the EPA when evaluating the risk of herbicide use to the environment in general must surely be of some relevance to agencies such as BLM when evaluating the particular environmental impact of given herbicides in its EIS. To cut off federal agencies from reliance upon EPA registration of

the herbicide in the agency's assessment of herbicide use is not only to engender unproductive replication of government expenditures, but is alwo unwarranted in legal principle. For that reason also the assertion by the Court that FIFRA is irrelevant to the compilation of an EIS concerned with the environmental impact of herbicide use seems nonsensical. The environmental affect of herbicide use is the predominant concern of FIFRA.

If the Ninth Circuit's decision in SOCATS v. Clark, supra, is allowed to stand a number of results will follow. In the first place, FIFRA's mandate will be undercut. Every agency that now uses herbicides will have to duplicate, on its own, the work presently entrusted to the EPA by Congress. Public funds will be

expended unnecessarily in unproductive duplication. Equally, herbicide registration will become the province of every herbicide using agency, not just one, the EPA, as Congress had intended. Even though the EPA will have made its statutorily dictated determination that a registered herbicide does not present an unreasonable adverse risk to the environment or human health, federal agencies will be required to ignore that determination and begin afresh the task already carried out by EPA. Although the private sector will be able to use the herbicides registered under FIFRA, the federal agencies, as servants of the people and keepers of the public trust, will be forbidden access to the same herbicides, even though very often the agencies perform the same kinds

of tasks as the private sector herbicide users. It is difficult to perceive a rational position for FIFRA after the Ninth Circuit's SOCATS decision and yet the Congress has labored long and hard, over many sessions, to fashion legislation to safeguard the environment from adverse herbicide use. If the Ninth Circuit prevails, that Congressional effort will have been severely discounted. A means does exist, however, by which the mandate of NEPA, as interpreted in the CEQ Regulations, can be harmonized and implemented at the same time as the Congressionally dictated safeguards embodied in FIFRA. That means is by adoption of the Congressionally fashioned risk relevance criteria laid down in FIFRA, particularly in the 1978 amendments. Under this approach

a risk would be relevant, so as to trigger the need for a worst case analysis, if there was an information gap or scientific uncertainty relating to it, where a "validated test or other significant evidence raising prudent concerns of unreasonable risk to man or the environment" exists. In practical terms what that would mean is that if EPA has registrered a herbicide under FIFRA, other federal agencies would be able to rely on that registration in compiling their EIS's. They could rely upon it, not in any unreflective automatic manner but in a responsible way as a <u>beginning</u> to their risk assessment, not in total fulfillment of it. The agency would have to go further than simply checking to ensure that the herbicide was registered.

The agency would have to actively search for "significant evidence" that might exist as to unreasonable risks presented by the use of the herbicide. Normally, such a search would take the form of a thorough literature search of the most current scientific research being developed on the use of the herbicide. Only if that search, coupled with the data compiled by EPA in its FIFRA registration process, presented "significant evidence" such that "prudent concerns" are raised that the herbicide use might probably present risks to humans and their environment would one be able to conclude that a relevant risk existed. That relevant risk assessment might then trigger the need for a worst case analysis if there was scientific uncertainty or data gaps

relating to probable, relevant risks. Prior to that point one would be engaging in fear analysis, not risk analysis. Only the latter will present relevant information needed to be included in the EIS.

CONCLUSION

For the foregoing reasons, the Federal Government's petition for writ of certiorari should be granted.

Respectfully submitted,

DILORENZO & DIETZ
Attorneys for Amicus
Oregonians for Food & Shelter, Inc.

_____
by: John A. DiLorenzo, Jr.
(Counsel of Record)
and
Brendan Stocklin-Enright
Attorneys

_____
Dated

No. 84-267

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1984

William P. Clark, et al.,
Petitioners,
v.
Southern Oregon Citizens Against
Toxic Sprays, Inc.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

AMICUS BRIEF OF PAUL MERRELL AND SAVE OUR ecoSYSTEMS, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether 40 C.F.R. § 1502.22(b) requires the Bureau of Land Management (BLM) to prepare a worst case analysis of the effects of using herbicides on BLM lands when there is scientific uncertainty concerning the effects of those herbicides on human health.

AMICUS PARTIES

Paul Merrell is an inholder in the Siuslaw National Forest. He successfully represented himself in a suit against the Forest Service, the BLM and EPA over the use of herbicides in the valley where he resides. The case took his full time for over two years. When the government appealed the district court's decision, Michael Axline, one of the attorneys submitting this amicus brief, represented Mr. Merrell before the Ninth Circuit. The Ninth Circuit affirmed the district court's decision in Merrell v. Block, Nos. 83-3887, 83-3916 (9th Cir. Jan. 27, 1984) (petition for rehearing pending). Merrell and his family have suffered extensive injuries as a result of herbicide use by federal land management agencies on property adjoining their property. Carol Merrell

suffered two separate miscarriages shortly after two separate incidents of exposure to herbicides.

Save Our ecoSystems is a small, non-profit, Oregon corporation dedicated to improving the quality of the environment. It successfully sued in federal district court when the BLM, as a result of the court's opinion in the instant case, prepared what the BLM called a "worst case analysis" (actually a "best case analysis"). The government also appealed this decision to the Ninth Circuit. The case was jointly argued with Merrell v. Block, supra, and the Ninth Circuit affirmed the district court. Save Our ecoSystems v. Clark, Nos. 83-3908, 83-3918 (9th Cir. Jan. 27, 1984) (joint opinion with Merrell v. Block). The interests of amicus parties are directly affected by the Petition filed by the government in the instant case.

Paul Merrell filed an amicus brief before the Ninth Circuit in this case. Petitioners and Respondents have consented to the filing of this amicus brief (see Appendix A, attached).

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I. STATEMENT OF THE CASE

This case involves the application of a straightforward and unambiguous regulation, 40 C.F.R. § 1502.22(b), to an uncontested set of facts. The Circuits of the United States Court of Appeals are in agreement as to the proper interpretation of 40 C.F.R. § 1502.22(b).[1/]

40 C.F.R. § 1502.22 is a regulation of the Council on Environmental Quality (CEQ).[2/] 40 C.F.R. § 1502.22(b) directs

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1/ The Ninth Circuit in this case stated: "[40 C.F.R.] § 1502.22 is not difficult to interpret. It is straightforward and means what it says." Petitioners' Appendix at 11a. See also Sierra Club v. Sigler, 695 F.2d 957, 973 (5th Cir. 1983) ("This regulation is quite straightforward"). The Petitioners did not appeal the District Court's factual findings. See Petitioners' Appendix at 4a.

2/ The CEQ's regulations implement the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., are

agencies to prepare a "worst case analysis" of environmental consequences when considering whether to proceed with a proposal in the face of uncertainty about the proposal's environmental effects. The uncertainty here is whether the use of herbicides by the BLM will cause cancer, birth defects, and gene mutations among exposed humans.

It is uncontested that there is scientific uncertainty regarding the human health effects of the herbicides which the BLM proposes to spray. The District Court, the Ninth Circuit, Plaintiff's witnesses, and Petitioners' own witnesses agreed, for example, that there is evidence that the herbicide 2,4-D is a carcinogen. The Petitioners'

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binding on all federal agencies and are "entitled to substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 357 (1979). Petitioners do not challenge the validity of 40 C.F.R. § 1502.22.

expert, Dr. Dost (a veterinarian), testified to the existence of studies (with which he disagreed) suggesting that 2,4-D causes cancer. Dr. Dost also recognized:

> There is presently valid scientific disagreement on the applicability of the threshold concept in assessing the dose necessary to initiate cancer. The reason is that cancer is a proliferative disease, and it is argued by some that any dose of a carcinogen, no matter how minute has some finite probability of causing cancer.

Petitioners' Appendix at 21a (emphasis added).

The "valid scientific disagreement" referred to by Dr. Dost consists primarily of Dr. Dost disagreeing with the rest of the scientific community in the United States, including the National Academy of Sciences,[3/] the National Can-

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[3/] The National Academy of Sciences has observed: "[T]he no effect level is

cer Institute, and the federal government's Interagency Regulatory Liaison Group about the propriety of establishing threshold levels below which a carcinogen can be expected to have no impacts.[4/]

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statistically meaningless and therefore of limited value since it merely means that no effect was observed in studies using a group of animals of a particular size. Such an observation is completely compatible with the presence of an adverse effect . . ." National Academy of Sciences, Principles for Evaluating Chemicals in the Environment, at 83 (Washington, D.C. 1975).

4/ According to the Interagency Regulatory Liaison Group (IRLG): "There is presently no acceptable way to determine reliably a threshold for a carcinogen for an entire population." 44 Fed. Reg. 39,858, 39,876 (Friday, July 6, 1979). The IRLG is composed of scientists from the EPA, the Food and Drug Administration, the Consumer Product Safety Commission and the Occupational Safety and Health Administration, as well as senior scientists at the National Cancer Institute and the National Institute of Environmental Health Sciences. The report reflects their "best judgment . . . on the scientific concepts and methods currently in use to identify and evaluate substances that may pose a risk of cancer to humans." Id. See also Leape,

Because the uncontested evidence introduced at trial reveals significant scientific uncertainty about the effects on human health of the herbicides which the BLM proposes to use, the lower courts properly concluded that the BLM must prepare a worst case analysis in accordance with 40 C.F.R. § 1502.22(b).[5/]

"Quantitative Risk Assessment in Regulation of Environmental Carcinogens," 4 Harv. Env'tl L. Rev. 86, 100 (1980) (It is . . . widely agreed that, at least when formulating public health policies, one should assume that there are no thresholds or 'safe' doses.")

5/ 40 C.F.R. § 1502.22 provides:

> When an agency is evaluating significant adverse effects on the human environment . . . and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.
>
> . . . .
>
> (b) If (1) the information

II. REASONS FOR DENYING THE PETITION

Petitioners' objections to the decision of the Ninth Circuit rest on two assertions: (1) NEPA does not

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> relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

40 C.F.R. § 1502.22 codifies prior NEPA case law requiring agencies to disclose and examine uncertainties about the effects of their proposals. See Sierra Club v. Sigler, 695 F.2d 957, 971 (5th Cir. 1983) (en banc) ("The CEQ's regulation merely codifies these judicially created principles").

require "completely hypothetical worst case scenarios" and Plaintiffs have not demonstrated a risk that the worst case will actually occur (Petition at 8); and (2) the BLM should be excused from its NEPA duties because the EPA has conditionally registered the subject herbicides under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (FIFRA). The first assertion ignores the record in this case, the purposes of NEPA generally, and the purposes of 40 C.F.R. § 1502.22(b) in particular. The second assertion ignores the purposes and limitations of the FIFRA registration process. The lower courts have uniformly rejected Petitioners' arguments over a period of seven years.

A. Plaintiff Has Demonstrated A Risk Adverse Health Effects Will Occur.

Both the District Court and the Court of Appeals found that the BLM's proposal to spray herbicides created serious health risks. Nevertheless, Petitioners contend in this Court that because: "there is no credible scientific evidence that 2,4-D or any of the other proposed herbicides has any carcinogenic effects," no worst case analysis need be prepared. Petition at 11. Petitioners' bald statement that there is no scientific evidence suggesting that the herbicides at issue might affect human health is flatly contradicted by the actions of EPA, by the record, by the opinion of the District Court, and by the opinion of the Court of Appeals. The District Court found that at least three studies indicate that 2,4-D causes cancer.[6/] EPA itself

has, on the basis of these studies, ordered the preparation of additional studies of the carcinogenic and other effects of 2,4-D. Appendix B. The record clearly shows that, at a minimum, there is scientific uncertainty about the effects of 2,4-D. The Petitioners ignore, rather than rebut, this overwhelming evidence.

More fundamentally, Petitioners' demands for proof of cancer-causation distort 40 C.F.R. § 1502.22(b)'s purpose and triggering provisions. It is not necessary to prove that the proposed use of herbicides will cause cancer, birth defects or gene mutations before the BLM must assess the problem and prepare a worst case analysis under 40 C.F.R.

6/ See Petitioners' Appendix at 22a-23a (opinion of District Court citing studies by Dr. Reuber, a Russian study and Swedish studies).

§ 1502.22(b). It is only necessary to demonstrate that there is sufficient disagreement in the scientific community regarding the carcinogenic and mutagenic properties of these herbicides. If credible scientists believe these herbicides cause or may cause cancer and birth defects, Petitioners must discuss in an EIS the possibility that these scientists might be correct.

Petitioners' fear that agencies will be forced to concern themselves with an array of "phantasmagorical" disasters (Petition at 11) is, as the Ninth Circuit put it, largely "self-induced." Petitioners' Appendix at 11a. 40 C.F.R. § 1502.22(b) contains two precise and reasonable standards for determining which uncertainties are sufficiently important to compel a worst case analysis. Before a worst case analysis must be prepared, (1) the

potential effects must be significant,[7] and (2) the uncertainties must be serious enough to make consideration of those uncertainties essential to a reasoned decision.

Petitioners do not challenge the district court's finding of fact that these two tests were met.[8] Rather,

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[7] Both courts below correctly concluded that the environmental effects in question here --cancer, birth defects, and gene mutations-- are "significant." See Petitioners' Appendix at 6a (Ninth Circuit Opinion); Petitioners' Appendix at 20a (District Court Opinion). See generally 40 C.F.R. § 1508.27 (effect on "public health and safety" is one factor in determining significance); CATS v. Bergland, 428 F. Supp. 908, 927 (D. Ore. 1977) ("no subject to be covered by an EIS can be more important than the potential effects of a federal program upon the health of human beings.")

[8] Petitioners do criticize the district court for deciding the case "solely" on the basis of expert testimony, Petition at 11, note 10, and claim that "[c]ourts are hardly well suited for making such judgments after a trial." Petition at 11, note 10. Perhaps Petitioners would have preferred

they claim that the potential effects are too remote to warrant consideration because no "'real possibility of the occurrence has been proved.'" Petition at 11, quoting Sierra Club v. Sigler, 695 F.2d at 975 n.14 (emphasis by Petitioners). Plaintiff's evidence at trial, however, clearly established the real possibility that adverse health effects will follow from herbicide exposure. Evidence in the record supporting this conclusion includes: (1) affidavits of Ruth Shearer, a genetic toxicologist, reviewing studies which sug-

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that the court decide the case based on lay testimony and without a trial. Petitioners' arguments are frivolous. Expert testimony at trial is the best conceivable basis for the district court's decision. Moreover, the district court did not have to resolve controversy based on the technical merits of the expert's positions, it only had to find that there was sufficient disagreement between scientists to warrant a worst case analysis. Courts are ideally suited for such a task.

gest that phenoxy herbicides cause serious health effects, including cancer; (2) the affidavit of the BLM's own expert Dr. Dost, stating in part: "There is presently valid scientific disagreement on the applicability of the threshold concept in assessing the dose necessary to initiate cancer . . ." (3) the recommendation of the Scientific Advisory Panel to the EPA that further tests of the oncogenicity (tumor promotion) of 2,4-D be conducted, (4) evidence that EPA is in fact reviewing the effects of 2,4-D (affidavit of Ruth Shearer) (see also Appendix B to the brief); and (5) the testimony of Dr. Reuber, and the Swedish and Russian studies cited in footnote 6, supra.

But Petitioners still are not satisfied. In essence they demand proof, rather than a real possibility, that these effects will occur. This added

element amounts to imposing on plaintiffs the burden of proving causation. Such a requirement is inappropriate where the scientific uncertainty concerns precisely the causation issue. In responding to this argument, the Ninth Circuit wrote:

> The BLM's belief that its herbicides are safe does not relieve it from discussing the possibility that they are not, when its own experts admit that there is substantial uncertainty. When uncertainty exists, it must be exposed.

Petitioners' Appendix at 7a (emphasis in original). Petitioners' demand for proof of causation as a prerequisite to preparing a worst case analysis is particularly inappropriate when such proof is not a prerequisite for considering impacts in EISs generally. Agencies cannot limit their inquiry to effects that are certain to follow from a pro-

posed action. They must also examine effects which may be caused by the proposal. See Metropolitan Edison Co. v. People Against Nuclear Energy, U.S. ____, 103 S. Ct. 1556, 1561 (1983) ("Another effect of renewed operation [of a nuclear plant] is a risk of a nuclear accident) (emphasis added); Scientists Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("Reasonable forecasting and speculation is thus implicit in NEPA . . .").

Issues of possibility, probability, and remoteness must be considered under 40 C.F.R. §1502.22(b), but only after the worst case analysis is prepared. 40 C.F.R. § 1502.22(b) provides: "If the agency proceeds [in the face of uncertainty] it shall include a worst case anlysis and an indication of the probability or improbability of its occur-

rence." (Emphasis added). According to the plain language of 40 C.F.R. § 1502.22(b), the likelihood of occurrence is not a threshold factor in determining whether a worst case analysis is required.[9] Petitioners overlook this language in their attempt to put the cart of government discretion before the horse of public disclosure of health information.[10]

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[9] See Sierra Club v. Sigler, supra 695 F.2d at 974 ("as to remoteness, the triggering provisions do not use it as a criterion"); Village of False Pass v. Watt, 595 F. Supp. 1123, 1152 (D. Alaska 1983).

[10] None of the four cases cited by Petitioners in support of their remoteness argument address 40 C.F.R. § 1502.22. Two of the cases involved consequences only distantly related to the agency action. See Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060, 1067 (5th Cir. 1977) (effect of dam on agricultural use of groundwater); Trout Unlimited v. Morton, 509 F.2d 1267, 1284 (9th Cir. 1974) (effect of dam on second home development in locality). A third case concerned alternatives to a proposal, not its consequen-

The CEQ's interpretation of its own regulation also rebuts Petitioners' argument. In responding to comments on a draft of the regulations the CEQ stated:

> Several commenters expressed concern that this requirement [for a worst case analysis] would place undue emphasis on the possible occurrence of adverse environmental consequences regardless of how remote the possibility might be. In response, the Council added a phrase designed to ensure that the improbability as well as the probability of adverse environmental consequences would be discussed in worst case analyses under this section.

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ces. See NRDC v. Morton, 458 F.2d 827, 836-37 (D.C. Cir. 1972) (rejecting claim that agency must consider alternative national energy policies, such as oil shale development, before granting offshore oil and gas leases). In the final case (the only one decided after the enactment of 40 C.F.R. § 1502.22), the agency effectively eliminated the uncertainty by commissioning an extensive study of the dangers of building a dam near a fault system. See Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980).

43 Fed. Reg. 55,978, 55,984 (Wednesday, November 29, 1978) (emphasis added). The District Court and the Ninth Circuit properly found that the record in this case demonstrates the need for a worst case analysis under 40 C.F.R. § 1502.22(b). There is, therefore, no reason for issuing a Writ of Certiorari.

B. Registration of Herbicides Under The Federal Insecticide, Fungicide, And Rodenticide Act (FIFRA) Does Not Relieve The BLM of its NEPA Obligations.

Petitioners argue that 40 C.F.R. § 1502.22(b) should not apply to BLM decisions to spray herbicides because herbicides are registered for marketing in the United States by the EPA, pursuant to FIFRA. Petitioners do not disclose that all of the herbicides at issue in this case are conditionally registered and require additional information as to their safety before they

may be fully registered under FIFRA. The Petitioners' registration argument, therefore, is irrelevant to this case, which does not involve any chemicals which have been registered on the basis of information required by FIFRA. Even if the chemicals involved were fully registered, Petitioners do not discuss the type of anlaysis performed by EPA prior to registering herbicides, or explain why such an analysis might satisfy another agency's NEPA obligations. Nevertheless, Petitioners seek permission to rely on EPA's registration to avoid their obligations under 40 C.F.R. § 1502.22(b).

EPA's registration of herbicides under FIFRA does not involve many of the considerations required by NEPA. Certainly EPA's registration of herbicides under FIFRA does not involve preparation of a worst case analysis. Petitioners'

argument that requiring a worst case analysis will require substantial duplication of agency effort is factually incorrect, was not raised below, and rests upon 40 C.F.R. § 1502.22(a), which is not at issue in this case.

1. The Herbicides BLM Proposes to Use Are Conditionally Registered Because of Incomplete Data On Their Effects.

FIFRA provides for "conditional registration" of chemicals where the data necessary to satisfy FIFRA's registration standards has not yet been generated. See 7 U.S.C. § 136a(c)(7)(C) ("The Administrator may conditionally register a pesticide . . . for a period reasonably sufficient for the generation and submission of required data . . ."). For chemicals registered prior to the 1978 amendments to FIFRA (which imposed additional safety information

requirements on previously registered pesticides), registrations may continue pending the completion of new studies. See 7 U.S.C. § 136a(c)(2)(B). Each of the herbicides at issue in this case is registered under one of these provisions, and by definition, therefore, EPA lacks information necessary to fully register them. See Appendix B (data call in for 2,4-D); Save Our ecoSystems v. Clark, Civ. No. 83-3908 (Ninth Cir. Jan. 27, 1984)) (petition for rehearing pending) (Slip Op. at 11, 23 note 9).

It is not necessary in this case to reach the question of whether the Petitioners may rely upon EPA's consideration of the impacts on human health of registered chemicals because the uncontested evidence shows that EPA itself is still in the process of considering the human health impacts of these chemicals. There is legitimate scientific

uncertainty concerning the risks posed by the proposed herbicides, EPA has not resolved the uncertainty or prepared a worst case analysis, and the Petitioners therefore may not rely on EPA's "registration" as an excuse for not preparing a worst case analysis.

2. The Standard For Registering Chemicals Under FIFRA Is Not Safety, But Whether Benefits Exceed Costs.

Under FIFRA, pesticides may be registered for commercial marketing in the United States if they "will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). FIFRA defines "unreasonable adverse effects on the environment" as: "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any

pesticide." 7 U.S.C. § 136(bb). Petitioners accurately describe the shortcoming of the standard: "Obviously, EPA's registration of an herbicide is not a guarantee of safety to either man or the environment." Petition at 15. Petitioners go on to state: "We recognize that in some cases a substance will be registered, even though it is known to cause serious environmental effects, on the basis that the benefits outweigh the risks." Id. This is a remarkably frank admission in this Court, and contradicts the Petitioners' position below.

Petitioners' statements to this Court should be contrasted with their policy regarding the public discussion of safety issues in EISs. That policy is:

> [t]opics which address issues of herbicide toxicity and/or human health effects should be

> avoided. Such subject matter is more appropriately discussed by expertise in other federal or state agencies. Simply stated, our position is: that so long as herbicides are registered and approved for forestry use by EPA, BLM may appropriately use such chemicals within specified procedural safeguards.

BLM Field Guide to Policies and Procedures Required For Vegetation Management with Herbicides In Western Oregon (quoted in Save Our ecoSystems v. Clark, supra, Slip Op. at 23, n.8). Petitioners thus have a policy against disclosing or discussing in EISs issues relating to the safety of the herbicides they propose to use.[11/] In short, although

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11/ Petitioners predict that a worst case analysis of 2,4-D's health effects will "merely mislead and confuse both decisionmakers and the public." Petition at 16. Petitioners apparently feel that the public must be protected from information on the possible dangers of these chemicals. This condescending attitude robs individuals of the opportunity to judge the evidence for themselves and make their personal decisions

Petitioners admit before this Court that registration is no guarantee of safety, it is their policy to respond to the public's questions about safety by treating the registration process as if it did guarantee safety. Preparing a worst case analysis will force Petitioners to abandon this deception.

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accordingly. Moreover, it further insulates the BLM from public scrutiny of the merits of its herbicide program. This Court has observed with regard to public disclosure of information generated through FIFRA registration:

> [P]ublic disclosure can provide an effective check on the decisionmaking processes of EPA and allows members of the public to determine the likelihood of individualized risks peculiar to their use of [or exposure to] the product.

Ruckelshaus v. Monsanto Co., ____ U.S. ____, 104 S. Ct. 2862, 2880 (1984).

3. EPA Is Not Required By FIFRA to Include a Worst Case Analysis In the Registration Process.

Nothing in FIFRA requires preparation of a worst case analysis by EPA prior to the registration of a pesticide. See generally 7 U.S.C. §§ 136-136y. Even if EPA included a worst case analysis in its registration process, the secrecy of that process would prevent reliance on EPA's registration by other agencies. Until the decision of this Court in Ruckelshaus v. Monsanto Co., _____ U.S. _____, 104 S. Ct. 2862 (1984), the chemical industry had successfully prevented public release by EPA of data submitted in support of registration. For a worst case analysis to perform its intended function, however, it must reveal the worst case to the public and to the decisionmakers. The unavailability of EPA's registration

information precluded consideration of the information by the public and decisionmakers.

Agencies are specifically prohibited from relying in EISs on proprietary data unavailable to the public (40 C.F.R. § 1502.21). Adopting Petitioners' position would result in the anomaly that, although Petitioners may not rely on non-public proprietary information in their EISs, they may rely on such information if it is in the (exclusive) possession of another agency. Even releasing information submitted in support of registration will not substitute for the preparation of a worst case analysis, however, since information submitted in support of registration does not disclose worst case scenarios.

4. Preparation of a Worst Case Analysis Will Not Result In a Duplication of Effort.

In Oregon Environmental Council v. Kunzman, 714 F.2d 901 (9th Cir. 1983), the court refused to allow the Department of Agriculture to rely on the fact that a chemical had been registered by EPA to avoid discussing the health risks of spraying that chemical in a populated area. The Ninth Circuit in the instant case applied that decision to rebut Petitioners' argument that FIFRA registration removes the need for examining an herbicide's safety. Petitioners now argue, without any supporting facts, precedent or analysis, that applying 40 C.F.R. § 1502.22 to the use of herbicides will result in duplication of effort and unnecessary expenditures of funds.

Petitioners raise this argument in

the wrong case. The Ninth Circuit in this case merely ordered preparation of a worst case analysis (something EPA has not prepared and which therefore would not "duplicate" anything). The court did not order in this case "independent research on the health effects . . . of herbicides." Petition at 20. Although the Ninth Circuit did order such research, pursuant to 40 C.F.R. § 1502.22(a), in Save Our ecoSystems, supra, that case is not before the Court. Petitioners' concern about research is merely an attempt to divert attention from the fact that they have steadfastly refused to discuss even the information on adverse health effects that they already have or can easily obtain. There can be no other meaning to the Petitioners' Field Guide, quoted supra, than that discussions of herbicides' effects on human health "should

be avoided."

A worst case analysis is actually intended to avoid the duplication Petitioners fear, by acting as a safety valve when the cost of doing research is "exorbitant." See 40 C.F.R. § 1502.22(a). A worst case analysis does not require millions of dollars in research. It simply requires disclosure of possible worst case scenarios and consideration of whether it is likely these scenarios will occur. Petitioners' argument that the Ninth Circuit's ruling in this case will result in duplication of effort and the expenditure of enormous sums (there is absolutely no evidence of this in the record, since it was not argued below in this case) is contrary to the plain language of 40 C.F.R. § 1502.22, which allows preparation of a worst case analysis as a means of avoiding exorbitant costs.

CONCLUSION

Lower courts are in agreement that 40 C.F.R. § 1502.22 is a simple, straightforward regulation that applies to the facts of this case. Petitioners have not demonstrated a conflict among Circuits nor any compelling reason to grant a Writ of Certiorari in this case. Amicus parties therefore request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Michael Axline
Counsel for Plaintiffs

ON THE BRIEF
Will Whelan
Legal Intern

Dated this 29th day of October, 1984.

APPENDIX A

ORDER AND NOTICE

Dear Registrant:

EPA recently completed a review of the available scientific information on the potential health effects of 2,4-D.

On April 29, 1980, based on the findings of the review, the Agency announced that significant gaps exist in the data base for 2,4-D and that additional scientific information will be required from the registrants under Section 3(c)(2)(B) of Federal Insecticide Fungicide Rodenticide Act (FIFRA), 7 U.S.C. 136a(c)(2)(B). This provision allows the Administrator of EPA to request any additional data from

pesticide registrants that is considered necessary to maintain the registration of existing products. . . .

. . . .

II. WHAT DATA ARE NEEDED

EPA has determined that significant gaps exist in the data base for pesticides containing 2,4-D compounds. In order to make further determinations concerning potential health effects of 2,4-D, the Agency has determined that data from the studies listed below are required to support the continued registration of all products containing the various forms of 2,4-D. The required studies must be conducted in accordance with the referenced sections of EPA's proposed pesticide registration guidelines, or other approved test standards such as those which are adopted by the Organization for Economic Cooperation

and Development (OECD) except as modified or supplemented below.

. . . .

DATA REQUIREMENTS

1. Oncogenicity studies

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2. Reproduction study

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3. Teratogenicity studies

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4. Neurotoxicity studies

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5. Metabolism studies

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6. Acute oral toxicity studies

. . . .

7. Acute dermal toxicity studies

. . . .

8. Dermal absorption studies

. . . .

. . . .

Sincerely yours,

Edwin L. Johnson
Deputy Assistant
Administrator for
Pesticide Programs

No. 84-267

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE PETITIONERS

In our petition we have explained that the court of appeals' decision requiring the Bureau of Land Management (BLM) independently to reassess the safety of herbicides employed in its land management activities that are approved for usage under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) effects an unprecedented and illogical expansion of federal agencies' obligations under the National Environmental Policy Act of 1969 (NEPA). We highlighted two major flaws in the analysis that impelled the court of appeals to its erroneous conclusion that

Council on Environmental Quality Regulation implementing NEPA (40 C.F.R. 1502.22) require preparation of a "worst case" analysis here. First, notwithstanding the consistent teaching of the cases—(the very cases interpreting NEPA that these regulations sought to codify)—the court of appeals read out of the worst case analysis regulation the threshold test that governs the obligation to prepare a worst case analysis. The court simply dispensed with the requirement that it be *demonstrated* that the effects to be addressed in such an analysis are sufficiently probable to make their consideration "essential to a reasoned choice among alternative[]" courses of action (40 C.F.R. 1502.22(b)(1)). As was acknowledged by the court of appeals in *Save Our Ecosystems* v. *Clark*, No. 83-3908 (9th Cir. Jan. 27, 1984), petition for rehearing pending, the effect of the court of appeals' instant decision is accordingly to require that worst case analyses be prepared as to "all possible long-range effects" (slip op. 24 n.9)—regardless of whether they are of any practical importance—unless the agency can prove that such remote events are entirely impossible.

Second, the court of appeals' decision disrupts the carefully crafted and complex framework devised by Congress in FIFRA for assessment of the health, safety and environmental effects of herbicides. There is no reason to believe that Congress intended to superimpose NEPA's general, unstructured, mandate for sensitivity to environmental consequences of federal agency action upon the detailed standards and procedures prescribed under FIFRA for addressing precisely the same concerns by requiring *EPA* to prepare environmental impact statements assessing the environmental effects of its own FIFRA *registration*

decisions. Yet the court of appeals blithely insisted that Congress intended that the BLM—an agency that proposes simply to *use* a registered herbicide in conformity with the limiting conditions of its registration—to undertake an environmental analysis under NEPA reconsidering the very environmental and safety issues that have been considered by EPA. The arguments of respondent and amici curiae Merrell et al. do not negate the importance of the matters presented for review.

1. ***The worst case analysis requirement***

a. Strikingly, neither respondent nor the amici endorses the court of appeals' interpretation of the worst case analysis requirement, under which federal agencies are obliged to prepare such analyses without regard to the substantiality of any element of uncertainty as to the effects of a federal action (see Pet. App. 6a). Indeed, countering our suggestion (Pet. 9-10) that the worst case analysis regulation, as applied by the court of appeals, is contrary to settled interpretations of NEPA, respondent places the regulation "squarely in the mainstream of NEPA" (Br. in Opp. 7; citations omitted; emphasis added):

> [Respondent] freely admits that NEPA does not require discussion of all potential impacts, no matter how remote or frivolous. However, as written * * *, neither does 40 C.F.R. § 1502.22 require such exercises in imagination. *The regulation is self-limiting in that respect.* Only scientific uncertainty which is "relevant" requires disclosure. 40 C.F.R. § 1502.22. Only if obtainable information is "essential to a reasoned choice," 40 C.F.R. §§ 1502.22(a) and 1502.22

(b)(1), or is "important to the decision," must the agency publish a worst case analysis.[1]

But this, of course, is precisely our point. Both the plain language of 40 C.F.R. 1502.22 and the decisions of the courts generally interpreting NEPA apply a rule of reason that qualifies the statutory obligation to consider the environmental impacts of federal action. See Pet. 9-10. The court of appeals below, however, required a worst case analysis here—even though it recognized "a lack of information about the probability of any adverse effect" (Pet. App. 5a). The court reasoned that, because science may not presently enable us to *rule out* all possibility that herbicide spraying has an effect on human health (*ibid.*), a worst case analysis was mandated. The court of appeals thus elided two separate elements of the "trigger" for application of the worst case analysis requirement—*i.e.*, that "information relevant to adverse impacts is * * * not known" and that such information is "essential to a reasoned choice among alternatives" (40 C.F.R. 1502.22(b)(1)).

b. The appropriateness of further review here is confirmed by respondent's discussion (Br. in Opp. 3-6) of *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983), which, we have explained (Pet. 11), conflicts with the decision of the court below. The court of appeals denied that its approach conflicted with that of the Fifth Circuit, asserting (Pet. App. 5a-6a) that *Sigler* rejects the threshold probability standard we advocate in this case. The court of appeals erred in

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[1] Similarly, the amici acknowledge (Merrell Br. 12) that, under the worst case analysis regulation, no worst case analysis need be prepared unless "uncertainties [are] serious enough to make consideration of those uncertainties essential to a reasoned decision."

that respect. To be sure, in *Sigler*, the court of appeals rejected the Corps of Engineers' contention that the risk of a total loss of cargo by an oil supertanker was too remote to trigger the worst case analysis requirement. But the court emphasized (695 F.2d at 975 n.14):

> We scarcely need add that while remoteness of a possible occurrence does not permit disregarding it in circumstances as these, where a real possibility of the occurrence has been proved and a data base for evaluating its consequences established, the Corps need not concern itself with phantasmagoria hypothesized without a firm basis in evidence and actual circumstances of the contempted project, or with disasters the likelihood of which is not shown to be significantly increased by the carrying out of the project.

Respondents do not defend the court of appeals' misreading of *Sigler* on this point. Instead they concede (Br. in Opp. 5) that the *Sigler* plaintiffs were properly required to " 'prove' something"—*i.e.* that the environmental impacts that they were required to address in a worst case analysis were not "frivolous possibilities."

How then do respondents seek to deny the existence of a conflict between the decision below and *Sigler*? Respondents resourcefully answer that, like the *Sigler* plaintiffs, they *were* actually required to make a threshold showing that an assessment of the effects to be addressed in a worst case analysis was essential to an informed decision by the responsible federal agency (Br. in Opp. 5):

> In *Sigler*, the plaintiffs proved that oil spills were to be expected. In this case, the plaintiff proved that the public would be exposed to herbicides.

But this comparison is fundamentally misleading. The adverse effect that respondent seeks to have addressed in worst case analysis is not simply the possibility of human exposure to sprayed herbicides, rather it is the alleged adverse health effects of spraying on the persons so exposed. Showing that human exposure is a reasonably likely possibility is not the equivalent of establishing that the alleged human health effects are something more than "frivolous possibilities." By contrast, in *Sigler*, the plaintiffs had established not only that a major oil spill was a "real possibility" (695 F.2d at 975 n.14), but also that substantial adverse environmental effects were reasonably likely to be associated with such a spill (695 F.2d at 974). Thus respondent's efforts to harmonize this case with *Sigler* is no more successful than the court of appeals' attempt.[2]

c. Adopting a different tack than respondent, the amici opposing the petition argue (Merrell Br. 13-14) that there *is* credible evidence that establishes a material possibility that "adverse health effects *will* follow from herbicide exposure" (*id.* at 13; emphasis in original). Contrary to the amici's contention (*id.* at 24-25) that BLM was aware of this evidence but declined to consider it, BLM specifically noted the existence of the few studies cited by respondent in its annual environmental assessment of the 1982 spraying program and, after evaluation, concluded that they lacked scientific credibility. See Bureau of Land

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[2] The court of appeals recognized that this case is not "closely analogous" to *Sigler* in the respect suggested by respondent (Pet. App. 5a):

> In *Sigler*, the "worst case" was an event of low probability but catastrophic effects and the scientific uncertainty concerned those effects. In contrast, this case involves a lack of information about the probability of any adverse effect.

Management, U.S. Dep't of Interior, *1982 Final Vegetative Management Program: Supplemental Environmental Assessment* Attch. E, a copy of which was previously lodged with the Clerk of the Court. Thus, rather than ignoring the existence of the scientific controversy surrounding the health impacts of the herbicides, the BLM disclosed the existence of the controversy, and, after weighing all the "evidence," including the fact that the EPA did not find the scientific uncertainty significant enough to warrant suspension or cancellation of the herbicides' registration under FIFRA, concluded that a probability of adverse human health effects sufficient to make resolution of scientific uncertainty essential to an informed decision had not been demonstrated. NEPA does not require more.

d. Respondent's argument, in the final analysis, appears to be (Br. in Opp. 8) that a worst case analysis should be prepared here because to do so would not be burdensome or expensive, the agency being required only set forth a litany of theoretically possible effects. The goal of the CEQ regulations, however, like that of NEPA generally, is not to reward fertile imaginations with a recitation of impacts the impossibility of which has not been proven, but to assure that decisionmakers are provided with information essential to a reasoned choice among the alternative courses of action open to them. Because time and resources are necessarily limited, diversion of agency attention to matters not material to the decision to be made is not simply an innocent—albeit unauthorized—extension of the requirements of NEPA. It is fundamentally inconsistent with Congress's plan for fostering rationality in administrative decisionmaking through NEPA.

2. *The import of FIFRA registration*

Respondent's stark declaration (Br. in Opp. 8) that "registration of herbicides under FIFRA is irrelevant" betrays a fundamental misunderstanding of the purpose and requirements of both NEPA and FIFRA, as well as a misdirected critique of the way in which FIFRA has been implemented. Respondent (Br. in Opp. 9) and the amici (Merrell Br. 23-24) argue that FIFRA registration must be discounted because registration is not a guarantee of complete absence of adverse effects. But NEPA's "essentially procedural" mandate (*Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980)) does not require *any* particular level of environmental protection. By contrast, FIFRA, which establishes substantive herbicide registration criteria, including the requirement that a herbicide not engender "unreasonable adverse effects on the environment" (7 U.S.C. 136a(c)(5)(C) and (D)), provides a far greater degree of assurance against untoward human health effects, and provides the appropriate forum for concerned persons to raise any questions they may have regarding the environmental safety of herbicides.

Respondent (Br. in Opp. 10) and the amici (Merrell Br. 21-23) criticize various aspects of EPA's administration of FIFRA; indeed, respondent labels the registration process "pro forma" (Br. in Opp. 11). But the court of appeals did not rest its decision in this case upon such concerns, but upon a blanket rule that FIFRA registration is wholly irrelevant to the NEPA obligations of a herbicide-using agency (see Pet. App. 7a-8a).[3] In any event, proceedings under

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[3] Ironically, it was only in *Save Our Ecosystems*, slip op. 9, 23-25 n.9—in determining the scope of the independent research on herbicide health effects that was held to be required

FIFRA itself—rather than NEPA—provide the appropriate vehicle for making any challenge to EPA's actions in administering the herbicide registration scheme.

Given the threshold requirement—acknowledged by respondent (see page 3, *supra*)—that material uncertainty on points of sufficient importance to affect a federal agency's decision be shown, failure to consider that a herbicide has been registered leads to results that are at best peculiar. The comprehensive and detailed regulatory scheme established by Congress in FIFRA—including the provisions for conditional registration—reflects Congress's deliberate judgment as to the standards and procedures required to achieve an appropriate assurance of herbicide safety, and the level of uncertainty or incomplete knowledge that is acceptable. Congress could not have intended that the BLM, the National Forest Service or any other agency using herbicides employ the NEPA process to second-guess or oversee EPA's administration of FIFRA. The court of appeals' decision in this case, and its offspring—*Save Our Ecosystems*—require just such an irrational approach to herbicide regulation. That decision accordingly should not stand unreviewed.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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of the agency—that the court of appeals relied on the conditional registration status of a particular herbicide.

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